Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SHANNON C. HORITA, PETITIONER,

v.

KAUAI ISLAND UTILITY COOPERATIVE,
A HAWAII CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether in light of the evolution of the doctrines of equitable tolling and equitable estoppel and the rejection by a number of state courts of the notification of discharge test enunciated by this Court in Delaware State College v. Ricks, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980) and Chardon v. Fernandez, 454 U.S. 6, 102 S.Ct. 28, 70 L.Ed.2d 6 (1981), would a revision of the notification of discharge test be appropriate.

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Petitioner, Shannon C. Horita respectfully petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the district court, is reproduced at App. 1a-4a. The Order Granting Defendant's Motion for Summary Judgment entered by the United States District Court for the District of Hawaii is reproduced at 6a-19a. The Order denying Petitioner's Petition to Panel Rehearing and Rehearing En Banc is reproduced at 20a.

JURISDICTION

The Order Granting Defendant's Motion for Summary Judgment was entered by the District Court on August 22, 2008. Petitioner, Shannon C. Horita timely filed her Notice of Appeal on September 12, 2008. The Memorandum decision of the United States Court of Appeals for the Ninth Circuit was filed on November 9, 2009. Petitioner filed her Petition for Panel Rehearing and Rehearing En Banc on November 26, 2009. The Order denying Petitioner's Petition for Panel Rehearing and Rehearing En Banc was filed on December 22, 2009.

On March 12, 2010, this Court extended the time within which Petitioner may file her Petition for Writ of Certiorari to April 6, 2010.

This Court has jurisdiction under 28 U.S.C. § 1254(1)

STATUTORY PROVISIONS INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964 provides:

> (a) It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual... because of such individual's race, color, religion, sex or national origin;

42 U.S.C. § 2000e-1(a)

Section 706(e)(1) of Title VII provides:

> (e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency.
>
> (1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has

> initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.
>
> 42 U.S.C. § 2000e-5(e)(1)

STATEMENT

Petitioner Horita is a Japanese-American woman and a resident of the County of Kauai, State of Hawaii, during the relevant time period. KIUC is a Hawaii corporation located in the County of Kauai, State of Hawaii, whose purpose is the generation, transmission and distribution of electricity to member-owners.

Horita began her employment with KIUC in January 2004 as a temporary employee in the Human Resources Department ("Human Resources"). On June 5, 2005, Horita became a permanent full-time Human Resources Administrator, Grade 9. Darnney Proudfoot ("Proudfoot") was Horita's immediate

supervisor. Proudfoot is a female whom Horita believes to be Chinese-American.

On or about December 6, 2005, Harry A. "Dutch" Achenbach ("Achenbach") became the Interim Chief Executive Officer ("CEO") of KIUC, and became the permanent CEO in February or March 2005. Achenbach is a Caucasian male.

On or about April 19, 2005, Achenbach informed KIUC employees that he intended to reorganize KIUC. Achenbach said that the National Rural Electric Cooperative Association ("NRECA") would conduct an organizational assessment. Achenbach also stated the that Human Resources Department ("Human Resources") costs too much and that it should be outsourced.

About two-weeks after June 5, 2005, when Horita became a permanent full-time Human Resources Administrator, Grade 9, Achenbach decided to downgrade her position to a Human Resources Assistant, Grade 7, which is a lower paying position. Achenbach directed Marcia Shimokawa ("Shimokawa"), Human Resources Administrator, to execute the downgrade to which Shimokawa objected. During this conversation, Achenbach commented to Shimokawa that Horita walked like a "sumo person."

Horita's salary was reduced although she refused to sign the revised employment offer. Horita continued to perform her duties despite the pay reduction.

On September 2, 2005, Achenbach met with the Human Resources staff, which included Horita, and informed them that Human Resources would be "outsourced" as recommended by the organization assessment by NRECA. Proposals from Altres and another vendor were being reviewed. Achenbach mentioned a cost savings of $500,000.00, which made it favorable to outsource Human Resources. Achenbach also stated that the Human Resources Administrator positions that Shimokawa and Horita held were both downgraded from Grade 9, with an annual salary of about $50,042.00, to Grade 5, with an annual salary of about $40,709.00. Shimokawa and Horita's positions were the only positions downgraded in the company. Lastly Achenbach stated that if Human Resources were to remain in-house, the Human Resources staff would be able to get their jobs back.

Achenbach wrote a letter to Horita dated September 28, 2005. This letter informed Horita that her position in Human Resources would be eliminated on December 31, 2005.

On October 4, 2005, Horita received an offer from KIUC for the Administrative Assistant position in Member Services, which paid less than what Horita was earning. Horita was advised that if she did not accept the position, she was free to bid for another vacancy in the company before being displaced on January 1, 2006. Horita declined the job offer, and attached an October 4, 2005 memorandum to Achenbach stating in part, ". . . you mentioned the existence of 17 new positions resulting from this reorganization in the September 2, 2005 Human

Resources Department meeting. I would be willing to consider any one of these as they become available."

On October 12, 2005, Randall Hee ordered Horita to vacate her office by October 24, 2005, to make room for the newly formed Legal Department. Mr. Hee acknowledged that he was displacing the Human Resources staff and that a position was filled without offering it to the Human Resources staff.

On October 24, 2005, Randall Hee called a meeting with the employees of the Legal, Executive, and Human Resources departments to discuss the reorganization of the former Human Resources offices, and stated that the Human Resources employees, Shimokawa and Horita, would report to the new Utility Attorney, Karen Baldwin ("Baldwin"), effective October 31, 2006.

On November 2, 2005, Baldwin took Horita around the workplace and pointed out what she wanted cleaned in the employee lounge, women's locker room/restroom, and kitchen area. Baldwin also gave the same directions to Shimokawa. Later that afternoon, Baldwin asked Horita if the work was done. Horita responded that she had more important work to do, that janitorial work was not part of her normal job duties, and that KIUC had a janitorial service to perform such work safely.

On November 18, 2005, Horita was called into Baldwin's office and was given a written warning for "being unfriendly and unhelpful to employees." Baldwin did not give Horita a prior verbal warning, nor did she provide her the name of her accusers and any

details about the incident, which was contrary to KIUC's disciplinary policy. The warning letter placed Horita one step away from being suspended, and two steps from being terminated for cause. Horita told Baldwin that she, Baldwin, had created a hostile environment.

On November 19, 2005, Horita saw her physicians for anxiety symptoms which she had developed that month, experiencing uncontrollable shaking and difficulty in breathing. Horita submitted physicians' notes to KIUC stating that Horita was not able to work from November 21, 2005 to January 3, 2006. During her illness, Horita was prescribed medications which included Wellbutrin and Zoloft, which are anti-depressants.

On December 13, 2005, KIUC issued an announcement that Jackie Cachero ("Cachero") was selected to the Employee Services Coordinator position. Cachero would have the same functions which Horita had been performing as a Human Resources Administrator. Human Resources remains in-house with none of the Human Resources responsibilities outsourced.

Horita received a letter dated December 20, 2005 from Baldwin advising her that effective January 1, 2006, Horita would be laid-off from KIUC. Also, the December 20, 2005 letter from Baldwin to Horita stated in part:

> As Mr. Achenbach informed you in his letter of September 28, 2005, your position in Human Resources will be eliminated December 31, 2005.

> Therefore, effective January 1, 2006 you will be laid off.
>
> You were offered the opportunity to apply and interview for various open positions. You have chosen not to apply for any positions.
>
> If you recover within 60 days of your lay-off, you may be recalled based on KIUC's operational needs, your work performance and your qualifications. If you are released from your physician's care and are able to work during this time period, please inform us of your availability.

On September 21, 2006, Horita submitted to the Equal Employment Opportunity Commission ("EEOC") and Hawaii Civil Rights Commission ("HCRC") her Charge of Employment Discrimination, alleging Defendant's action constituted unlawful race, national origin and sex discrimination. On May 25, 2007, the EEOC issued to Horita her right to sue letter.

On July 3, 2007, Horita filed her Court Complaint with the District Court. On May 21, 2008, KIUC filed its Motion for Summary Judgment and Separate and Concise Statement of Facts ("Motion").

On August 19, 2008, the District Court heard KIUC's Motion. On August 22, 2008, the District Court filed its Order granting KIUC's Motion. In summary, the District Court determined that Horita failed to timely exhaust her administrative remedies as it was of the opinion that none of the discrete acts of discrimination complained of by Horita occurred within the 300-day limitation period to file an EEOC charge;

all occurred before November 25, 2005 per the District Court. Therefore, the District Court granted KIUC's Motion as to Horita's Title VII claims.

Also on August 22, 2008, the District Court filed the Judgment in favor of KIUC.

REASONS FOR GRANTING THE PETITION

A. Doctrines of Equitable Tolling and Equitable Estoppel

In Delaware State College v. Ricks, 449 U.S.250, 66 L. Ed.2d 431, 101 S.Ct. 498 (1980) and Chardon v. Fernandez, 454 U.S. 6, 70 L.Ed.2d 6, 102 S.Ct. 28 (1981), this Court enunciated the rule that the Statute of Limitations in discharge cases, starts to run on the date of notification of termination. To avoid the application of the date of notification of termination rule, the various Circuits have applied the doctrines of equitable tolling or estoppel which was held not to be resolvable by summary judgment.

In Aronsen v. Crown Zellerbach, 662 F.2d 584 (9th Cir. 1981), the plaintiff alleged that defendant-employer terminated him due to his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 ("ADEA"). The district court granted summary in defendant's favor holding that plaintiff was terminated at a meeting on March 31, 1975 when he was notified of the termination, and except for one brief assignment, did no work for the company. Thus, plaintiff's filing of his notice of intent to sue on January 19, 1977 was untimely under the ADEA.

The Ninth Circuit in Aronsen stated that a mechanical formulae would not suffice to identify accurately the date of an unlawful practice, in light of the Supreme Court's decision in Delaware State College v. Ricks, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed. 2d 431 (1980) The Ninth Circuit in Aronsen determined that in "Title VII, and analogously, ADEA discrimination suits inquiry for the purposes of determining when the limitation period begins to run must center on the date when the employee has notice of the unlawful act; neither succession of work nor official termination noted on company personnel records is singularly relevant to this inquiry."

The Ninth Circuit in Aronsen determined that a factual dispute existed as to whether plaintiff knew or should have known on or before March 31, 1975 that he was being terminated or that he was being subjected to an unlawful practice. Therefore, it reversed the district court's determination.

The Ninth Circuit in Aronsen also noted that on remand, the issue of equitable tolling may arise. Although plaintiff did not raise the issue of equitable tolling as a distinct issue on appeal, it was raised before the district court. Moreover, the issue was interconnected with the same facts and arguments as the accrual date issue, thus defendant suffered no prejudice.

The Ninth Circuit in Aronsen also stated that in ADEA cases, "equitable tolling or estoppel almost invariably involves the credibility of witnesses (and) (credibility) is difficult to determine from affidavits or depositions . . . Accordingly, summary judgment seldom

will be appropriate when tolling is in issue." 662 F.2d 584 at 595. The court further noted that in some equitable estoppel cases, the employer's conduct was found to hold out the possibility of reinstatement or otherwise to "lull" the employee into foregoing a timely filing. The Plaintiff proffered evidence that the defendant misrepresented to third party that it would reinstate plaintiff; defendant knew or had reasonably known that the third party would convey the misrepresentation to plaintiff; and plaintiff reasonably relied on the misrepresentation by forbearing to timely file his ADEA claim, citing McCoy v. San Francisco, City & County, 14 F.3d 28, 30 (9th Cir. 1994) wherein the Court held that issuance of written decision by defendant police commission constituted the discriminatory act rather that its oral decision rendered after hearing that triggers the statute of limitation, although plaintiff "knew" about defendant's decision after the hearing.

In Naton v. The Bank of California, 649 F.2d 691 (9th Cir. 1981), the Ninth Circuit determined that plaintiff-appellant did not timely file his notice of intent to sue as to his ADEA claim, but considered whether equitable modification was appropriate. It stated two kinds of equitable modifications have been recognized: (1) equitable tolling which often focuses on the plaintiff's exclusive ignorance of the limitations period and on lack of prejudice to the defendant; and (2) equitable estoppel which usually focuses on the actions of the defendants. 649 F.2d 691 at 696 (citations omitted). The Ninth Circuit also stated:

> Equitable modification of the limitations period may be appropriate when misleading conduct of

> the defendant has induced the plaintiff to delay filing notice of intent to sue. More specifically, in appropriate circumstances the defendant's records and correspondences may form the basis of equitable estoppel.
>
> A finding of estoppel must rest on consideration of several factors. Of critical importance is a showing of the plaintiff's actual and reasonable reliance on the defendant's conduct or representation. Also important is evidence of improper purpose on the part of the defendant, or the defendant's actual or constructive knowledge of the deceptive nature of its conduct. And, with respect to a claim for either tolling or estoppel, the trier should consider the extent to which the purposes of the limitations period have been satisfied, notwithstanding the delay in filing.
>
> We decline to evaluate these factors for the first time on appeal. Whether to grant equitable relief from the statutory provision is a matter that should be determined 'on a case-by-case basis, depending on the equities in each case.'

649 F.2d 691 at 696 (citations omitted).

Decisions in the Fifth, Sixth, Tenth and Eleventh Circuits would further indicate that the Court of Appeals have mitigated the application of the date of notification of the termination doctrine. In Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975), the issue before the Fifth Circuit was whether the then-90 day statute of limitations of Title

VII bars a suit by a plaintiff who did not learn nor in the circumstances could reasonably have been expected to learn the facts that would support a charge of unlawful employment practice until after the 90-day period clearly passed.

The Fifth Circuit in Reeb concluded that there were circumstances in that case to excuse plaintiff from compliance of the 90-day requirement. The defendants in Reeb did not demonstrate, nor allege any prejudice attributable to them by the failure to comply with the 90-day requirement. Also, the EEOC took the case on the merits, investigated, and issued the right to sue letter. Its action precluded the assumption that the case was stale simply because the 90-day period had elapsed.

Moreover, plaintiff in Reeb alleged that defendant actively sought to mislead plaintiff in informing her that her position would be terminated because adequate funds would no longer be available, and facts that would alert a reasonable person to the unlawful discrimination only became known to the plaintiff more than six months after the discriminatory act when a less qualified male replaced her.

In such circumstances, the Fifth Circuit in Reeb stated that the statute will not begin to run until the facts should be apparent to the person with a reasonably prudent regard for his rights. A corollary of this principle often found in cases where wrongful concealment of facts is alleged is that a party responsible for such wrongful concealment is estopped from asserting the statute of limitation as a defense.

In Rhodes v. Guiberson Oil Tools Division, 927 F.2d 876, revd on other grounds, 39 F.3d 537 (5th Cir. 1994), the district court dismissed plaintiff's ADEA claim against his employer because he failed to file his charge with the EEOC in a timely fashion. The employer represented to plaintiff that his position was being terminated due to a reduction in work force and plaintiff accepted that representation in light of a recession in the oil industry. Plaintiff later discovered that defendant hired a younger person to replace him. Assuming the 180-day limit for his EEOC charge began on the date of his discharge, plaintiff's filing was late.

The Fifth Circuit in Rhodes noted that under equitable estoppel, an employer is estopped from asserting the filing period if the employer misrepresented or concealed facts necessary to support a discrimination charge. If the defendant did conceal facts or mislead the plaintiff and thereby caused him not to assert his rights within the limitation period, the defendant is estopped from asserting the EEOC filing time as a defense.

The Fifth Circuit in Rhodes determined that the record showed that defendant's misstatement lulled plaintiff into not approaching the EEOC sooner. Plaintiff only knew that defendant said it was reducing its work force, he would be terminated, and he was 56 years old. He had no reason to suspect that his age was the reason for his discharge. Moreover, the oil industry was in a recession and defendant's proffered explanation seemed credible. Thus, plaintiff was precluded from evaluating his legal options until he discovered that he was misled by the misrepresentations. Thus, the Fifth Circuit determined

that equitable estoppel was applicable here. 927 F.2d 876 at 880-881.

In Ott v. Midland-Ross Corp., 600 F.2d 24 (6th Cir. 1979), plaintiff alleged that the defendant terminated his employment based upon his age in violation of the ADEA. Plaintiff filed his notice of intent to file a civil action with the Secretary of Labor. Thereafter, the Department of Labor advised plaintiff that it obtained defendant's voluntary compliance of the ADEA and that he would be reinstated. Plaintiff alleged that while he was awaiting reassignment, defendant induced him to forgo his ADEA rights by agreeing to hire him as a consultant. However, defendant later informed plaintiff that it would not honor the agreement. Plaintiff filed his civil action which the district court dismissed for being untimely in that it was filed almost seven and one-half months after the three-year period of limitation would normally have expired.

The Sixth Circuit in Ott reversed the dismissal and determined that the jury should decide when and whether the defendant's acts in securing the consulting agreement effected a tolling or suspension of the statute of limitations, and when and whether plaintiff discovered, or in the exercise of reasonable diligence, should have discovered that he had been wrongfully induced. Thus, if the jury finds that plaintiff was wrongfully led to forego his right to commence suit, it should compute the period of time within which plaintiff was thus deceived, and that time should not be charged against the three-year period for commencement of his action. 600 F.2d 24 at 32-33.

In Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976), plaintiff was employed by defendant whose employment was terminated due to a reorganization of the credit card department that left her with no work. Plaintiff contacted an attorney who advised her that an attorney was unnecessary and she should contact the Department of Labor to file a complaint, which she did. The Department attempted to conciliate plaintiff's complaint, but ultimately was unsuccessful. As a result, plaintiff filed her notice of intent to file a civil action, and then her civil action against defendant under the ADEA. However, the district court dismissed it determining that the plaintiff had untimely filed her notice of intent to file a civil action within the 180-day period under the ADEA and that she was not entitled to equitable tolling.

The Tenth Circuit in Dartt determined that the deadline to file a notice of civil action is subject to equitable tolling, and such tolling was appropriate here. It noted that plaintiff promptly sought private legal counsel, and filed her complaint with the labor department. Plaintiff testified that she kept regular contact with the department, and that it was not until after the 180-day period had run that plaintiff was informed that in order to file a private lawsuit against defendant she needed to file a notice of intent to sue within 180 days of the alleged discriminatory act. Plaintiff retained another counsel who promptly filed the notice, although 36 days past the statutory time period. Thus, the Tenth Circuit held that in light of the circumstances in this case, and because of the de facto fulfillment of the main purposes of the ADEA, that is, to provide the Labor Department with an opportunity to achieve a conciliation of the complaint while the

complaint is still fresh and to give early notice to the employer of a possible lawsuit the 180-day time limitation was tolled until the filing of plaintiff's notice of intent to sue. 539 F.2d 1256 at 1260-1262.

In Wilkerson v. Siegfried Insurance Agency, 621 F.2d 1042 (10th Cir. 1980), plaintiff sued defendant employer for wrongful termination due to age and sex in violation of the ADEA and Title VII, respectively. Plaintiff alleged that her employment was terminated on the pretext that her job was being eliminated, but she later learned that it was not abolished, and in fact had been filled by a younger person of the opposite sex. The district court granted summary judgment for defendant holding that plaintiff failed to timely file a notice of intent to sue with labor department for her ADEA claim, and failed to timely file her charge of discrimination for her Title VII claim. The district court also determined that plaintiff was not entitled to equitable tolling based upon affidavits. 621 F.2d 1042 at 1044.

The Tenth Circuit in Wilkerson stated that in light of its decision in Dartt, supra, the issue of whether plaintiff was entitled to equitable tolling of the running of the statutory time period could not be resolved by summary judgment, and that such resolution required an evidentiary hearing. "Whether a case warrants a finding of equitable tolling or estoppel almost invariably involves the credibility of the various witnesses. Credibility is difficult to determine from affidavits, or depositions." 621 F.2d 1042 at 1045. The Tenth Circuit in Wilkerson noted it was not suggesting that there should be a finding of equitable tolling or

estoppel in this case, but simply holding that the issue should be resolved after an evidentiary hearing.

In Cocke v. Merrill Lynch & Co., 817 F.2d 1559 (11th Cir. 1987), plaintiff's ADEA action was dismissed in summary judgment for defendant employer because he failed to file a timely charge with the EEOC within the statutory filing period. The district court also determined that equitable tolling was unjustified because when plaintiff received notice of termination, he was cognizant of his ADEA rights, and was suspicious that he was the subject of discriminatory conduct. In the notice of termination, the defendant represented that it would try to find another position in the company for him.

The Eleventh Circuit in Cocke reversed the district court. It described the standard for equitable modifications and that summary judgment is often inappropriate when tolling is at issue in an ADEA case, citing, Reeb and Naton, supra. 817 F.2d 1559 at 1561. It further stated:

> Applying these principles, the Court holds that while the employer is actively trying to find a position within the company for the employee, the 180-day filing period of section 626(d)(1) is equitably tolled until such time as it is or should be apparent to an employee with a reasonably prudent regard for his rights that the employer has ceased to actively pursue such a position. This court's application of equitable tolling to the situation here is in harmony with the ADEA's purpose of facilitating informal conciliation.

* * *

> It is too much for the law to expect an employee to sue his employer for age discrimination at the same time he is led to believe the employer is trying to place him in another job. The district court here, in holding the facts do not justify equitable tolling, placed too little weight on this practical situation. Although plaintiff was suspicious that the reason he had not been relocated prior to receiving notice of termination was because of his age, he may well have been justified in waiting before resolving that suspicion into a fact he should act upon during the time the employer made a good faith effort to relocate him. At least the situation presents a triable fact which cannot be disposed of on summary judgment

817 F.2d 1559 at 1561-1562.

In Pearson v. Macon-Bibb County Hospital Authority, 952 F.2d 1274 (11th Cir. 1992), plaintiff, a black female nurse, sued defendant employer for unlawful termination in violation of Title VII, among other claims. On October 16, 1985, defendant informed plaintiff that it decided to terminate her employment, but gave her the option to resign and seek employment at another hospital or apply for a transfer to another section within the hospital. If plaintiff refused either option, she would be terminated. Plaintiff advised defendant that she wished to seek a transfer to another hospital section and sought a position in the hospital Emergency Center but was told there was no opening available in that area. When offered a position within

the Urgent Care Position, plaintiff declined. Thereafter, plaintiff took a medical leave of absence, and was ultimately administratively terminated on January 21, 1986. Plaintiff filed her discrimination charge with the EEOC on April 28, 1986, 194 days after the notice of termination.

The district court in Pearson entered summary judgment against plaintiff as to her Title VII claim. It found that she failed to timely file her claim with EEOC within the 180 days of the alleged unlawful employment practice per 42 U.S.C. § 2000e-5(c). The Eleventh Circuit in Pearson determined that as the plaintiff was invited to seek a transfer as an alternative to termination, there are material issues of fact with respect to the issue of equitable tolling of the 180-day filing period. Thus, there needed to be a trial on the issue of availability of equitable tolling on the facts. 952 F.2d 1274 at 1270-1280, citing, Cocke and Reeb, supra.

In Stewart v. Booker T. Washington Insurance, 232 F.3d 844 (11th Cir. 2000), the plaintiff claimed that defendant-employer discriminated against her by transferring, terminating, and failing to rehire her on account of her sex and in retaliation for having filed a previous charge with the EEOC. Defendants contended that plaintiff received notice of her termination in May 1997 when she learned that employer's radio stations would be sold at which time all employees would be terminated. Plaintiff testified by affidavit that during the summer and fall of 1997 after defendant announced that its radio stations would be sold, many employees were offered interviews by the new owners. Plaintiff believed that she was not offered an interview because she believed she would

continue working for defendant's affiliated companies. By exit interview on November 3, 1997, plaintiff was told she was being terminated and her last day of work was November 21, 1997.

The district court agreed with defendant that plaintiff received notice of her termination in May 1997, therefore she did not file a charge with the EEOC within 180 days of the alleged unlawful practices, as required by 42 U.S.C. § 2000e-5(e)(1).

The Eleventh Circuit in Stewart determined that the district court erred in determining that plaintiff's EEOC charge of discriminatory and retaliatory termination was untimely filed and therefore also erred in granting summary judgment to the defendants. The defendants did not present any clear evidence that the decision to terminate plaintiff was made or communicated to her before November 20, 1997. Moreover, the district court improperly discredited plaintiff's testimony that she was never told before November 20, 1997 that she was or would be terminated. Since the charge filing period on a termination claim does not begin to run until an employee is told that she is actually being terminated and not that she might be terminated if future contingencies occur, and plaintiff filed a charge with the EEOC within 180 days of November 20, 1997, the district court erred in granting summary judgment to the defendants. 232 F.3d 844 at 848.

Also, the Eleventh Circuit in Stewart noted that based on the testimony of the president of the defendant companies, rather than establishing that defendants' employees, presumably including plaintiff,

were unconditionally told in May 1997 that they would be terminated, it appeared that the employees were told in a general meeting that defendants were concerned that the employees' jobs *may* be in danger, but that nothing was definite. Although plaintiff may have had a reason, based on the May 1997 meeting, to suspect that she *might* be terminated as a result of the sale of the stations, this was not enough to start the charge filing period running. The 180-day period did not run until plaintiff is told that she is actually being terminated, not that she might be terminated if future contingencies occur. 232 F.3d 844 at 849 ; see also, Wright v. AmSouth Bancorporation, 320 F.3d 1198 (11th Cir. 2003)(In an ADEA case, when an employee is left simply to infer and deduce that he may be terminated from the surrounding events, no unequivocal communication of an adverse employment decision has occurred; a plaintiff must be told that he is actually being terminated before the 180-day filing period begins to run.); Loe v. Heckler, 768 F.2d 409, 421 (D.C. Cir. 1985)("To insist that plaintiff have anticipated her employer's dishonoring its Title VII commitment would require that we attribute either the vision of Cassandra to employees or universal bad faith to employers. Title VII does not mandate preemptive strikes as a precondition to judicial oversight of subsequent misconduct.")

This Court's recent holdings in National Railroad Passenger Corporation v. Morgan, 536 U.S. 101, 153 L.Ed. 2d 106, 122 S.Ct. 2061 (2002) and Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 127 S.Ct. 2162, 167 L.Ed. 2d 982 (2007), also support Petitioner's position that the notification of discharge test articulated in the Ricks and Chardon

should be revisited. In the Morgan holding, this Court stated:

> ... Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the . . . 300-day time period after the discrete discriminatory act occurred. The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed. Nor does the statute bar an employee from using the prior acts as background evidence in support of a timely claim.
>
> As we have held, however, this time period for filing a charge is subject to equitable doctrines such as tolling or estoppel.
>
> * * *
>
> Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination . . . constitutes a separate actionable 'unlawful employment practice.' Morgan can only file a charge to cover discrete acts that 'occurred' within the appropriate time period.

536 U.S. 101 at 113-114 (citations omitted).

Further, in Ledbetter, this court stated: "[A] freestanding violation may always be charged within its own charging period regardless of its connection to other violations. " 127 S.Ct. 2162 at 2174.

Thus, it would appear that while lower federal courts are using the doctrines of equitable tolling and estoppel to mitigate the harsh effects of the Ricks and Chardon rules, this Court has held that there may multiple events which may be used to measure the statute of limitation effect.

B. State Court Rejection of the Ricks and Chardon Test

The Hawaii Supreme Court would appear to be one of the first state courts to reject the notification of termination test articulated by the Ricks and Chardon cases. In Ross v. Stouffer Hotel Company (Hawaii) Ltd., Inc., 76 Haw. 454 (1994), the Plaintiff claimed that he was the victim of marital status discrimination. The employer argued that the Plaintiff was not subjected to marital status discrimination and further argued that the Plaintiff's complaint to the State Department of Labor and Industrial Relations was untimely. The Hawaii Supreme Court rejected the employer's argument that the Hawaii Supreme Court adopt the Ricks and Chardon test.

The Hawaii Supreme Court rejected the Ricks test stating:

> A bright line rule that the filing Period commences on the date of actual discharge fairly accommodates the interests of both employees

and employers. On the one hand, such a rule favors adjudication of the merits of *HRS § 378-2* claims. We think it fair to say that many, if not most, employees become aware of and begin to pursue legal remedies for unlawful discharge only after they have actually been dismissed. Were the time for filing an administrative complaint to begin before that, *i.e.*, upon notification that the employer intended to discharge an employee, it is likely that many employees would have little or, perhaps, no time left to invoke the protections conferred by Part I of *HRS Chapter 378* following an unlawful discharge. We think a construction of *HRS § 378-4(c)* favoring adjudication on the merits is more consistent with the remedial purposes of Part I of *HRS Chapter 378* than one likely to bar potentially meritorious claims. As we said in *Puchert v. Agsalud, 67 Haw. 25, 677 P.2d 449 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985)*, in construing *HRS § 378-33(b)* (1985), which establishes the time periods within which an employee must file an administrative complaint for wrongful discharge or suspension in violation of *HRS § 378-32 (2)*:

> The construction of this section allowing a hearing on the merits and providing the employee with the avenue by which he may be afforded a remedy for the violation of his rights would be more consonant with the legislative enactment of remedial social legislation for workers than would a technical reading which

would deny relief without an opportunity to be heard.

On the other hand, our reading of *HRS § 378-4(c)* does not mean that employers will be forced to defend against large numbers of "stale" claims. The period between notice of and actual discharge is ordinarily relatively short. We think it unlikely that many claims will become stale in the interim. In addition, because an employer would know -- and, presumably, control -- when it notified an employee of his or her impending discharge, nothing would prevent it from taking steps to protect against the problems normally associated with stale claims.

Finally, a rule that the filing period commences on the date of actual discharge, like any bright line rule, has the virtue of simplicity. Because it removes any doubt about when the filing period begins, it has the beneficent effect of avoiding the protracted and expensive litigation over the precise date and adequacy of an employer's notice of termination that would inevitably result if we concluded that the date of notice triggered the filing period.

76 Haw. 454 at 461-462

The California Supreme Court in Romano v. Rockwell International, Inc., 14 Cal. 4th 479, 926 P.2d 1114 (1996) would appear to be the next major state court to reject the Ricks rule. In Romano, the employee, in 1988, was advised his second level supervisor wanted his termination. The employee agreed to the employer's terms that the termination would not take place until the employee qualified for full retirement in 1991. The employee resigned as agreed in 1991 and shortly filed a complaint for age discrimination.

Analyzing the Plaintiff's claim as implicating contractual, tort and statutory consideration, the California Supreme Court held that the date of termination and not notification of termination, was the date that the statute of limitations started to run. Rejecting the employer's argument that the Court should adopt the Ricks/Chardon rule, the Court stated that it was not bound by the Ricks/Chardon rulings in interpreting California law. As a matter of public policy, the Court stated:

> As we already have observed, the rule we propose to adopt does not burden employers unduly, because they have control over the date of notification of termination as well as the date of actual termination. Employers who recognize that the statute of limitations begins to run at the time of termination will have the ability to establish a record at the time of notification of discharge, demonstrating the propriety of the termination. Accordingly, the purpose of the statute of limitations, to protect against stale claims as to which evidence may be lost or

> memories faded, would be served adequately by the rule proposed. Nor do we believe it likely that such a rule will discourage employers from offering generous severance packages. We perceive minimal connection between severance benefits and the statute of limitations, apart from a hope on the part of the employer that the severance package will forestall any claim of wrongful termination.

14 Cal. 4th 479 at 500

Acknowledging that the majority of State courts that have considered the matter have adopted the Ricks/Chardon test, the Court of Appeals of Maryland, in Haas v. Lockheed Martin Corporation, 396 Md. 469, 914 A.2d 735 (2007), adopted the rule that a "'discharge' occurs upon the actual termination of an employee, rather than upon notification that such a termination is to take effect at some future date. Stating that many of the state courts which have adopted the Ricks/Chardon test, have done so with little analysis or discussion, the Court found persuasive the reasoning found in the opinions from Hawaii, California and New Jersey.

Stating that consultation with several popular dictionaries reveal that the commonly understood, plain meaning of "discharge" concurs with the view that a discharge occurs from the time the employee is terminated actually from employment, the Maryland Court of Appeal agreed with the decisions articulated by the California, New Jersey and Hawaii Supreme Court. As a matter of judicial policy, the Court stated that the date of termination rule would prevent

employees from suing their employers while employed, stating that employees would be hesitate to do so, because the discharge is so far in the future, and that such employees "are apprehensive about suing a party with whom they currently have, and may try to maintain, a job." 396 Md. 469 at 497.

Accordingly, the holding of the Ninth Circuit Court of Appeal holding that Petitioner did not timely file her complaint of discrimination was wrongly decided and should be reviewed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted:

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No. 08-17166
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHANNON C. HORITA, Plaintiff - Appellant,
v.
KAUAI ISLAND UTILITY COOPERATIVE, a Hawaii corporation, Defendant - Appellee.

October 14, 2009, Argued and Submitted, Honolulu, Hawaii
November 9, 2009, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Appeal from the United States District Court for the District of Hawaii. D.C. No. CV-07-0357-JMS-BMK. J. Michael Seabright, District Judge, Presiding.

COUNSEL: For SHANNON D. HORITA, Plaintiff - Appellant: JERRY P.S. CHANG, Clayton Ikei, LAW OFFICE OF CLAYTON C. IKEI, A Law Corporation, Honolulu, HI.

For KAUAI ISLAND UTILITY COOPERATIVE, a Hawaii corporation, Defendant - Appellee: Wayne S. Yoshigai, Esquire, Attorney, Tamara M. Gerrard, Esquire, Attorney, Kendra K. Kawai, Esquire, Attorney, Torkildson, Katz, Moore, Hetherington & Harris, Honolulu, HI.

Before: BEEZER, GRABER, and FISHER, Circuit Judges.

MEMORANDUM *

Plaintiff Shannon C. Horita appeals the district court's decision to grant Defendant Kauai Island Utility Cooperative's motion for summary judgment in this employment-related diversity case.

We review de novo the district court's grant of summary judgment. *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 896 (9th Cir. 2008).

1. The district court properly held that Plaintiff had failed to file a charge of discrimination with the Equal Employment Opportunity Commission within 300 days of any discrete act of discrimination. 42 U.S.C. § 2000e-5(e)(1). The latest date on which Plaintiff learned definitively of her impending termination was October 5, 2005, the date of a second letter Defendant sent to Plaintiff. That letter clearly and unequivocally told Plaintiff that her position would be eliminated and that she could be re-employed by Defendant through a 60-day bidding process. The letter dated October 5, 2005, if not the earlier letter relaying the same message on September 28, 2005, was the adverse employment action that triggered the running of the 300-day statute of limitations. *See* Del. State Coll. v. Ricks, 449 U.S. 250, 258, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980) (holding that the date on which the plaintiff learned of the defendant's denial of tenure, not the date on which the plaintiff became unemployed, was when the statute of limitations began to run). The fact that Plaintiff did not have evidence of a discriminatory motive until later

does not change the outcome under a straightforward application of the statute of limitations. *See id.* (holding that "the only alleged discrimination occurred--and the filing limitations periods therefore commenced--at the time the [adverse employment action] was made and communicated to [the plaintiff]").

2. We do not reach Plaintiff's claims of equitable tolling or equitable estoppel, which could toll the running of the 300 days until mid-December when Plaintiff claims she first learned of discriminatory intent (and thus of her claim). The facts on which Plaintiff relies to make these arguments on appeal are in the record, but she did not make these claims explicitly to the district court. Had she done so, Defendant might have introduced evidence to dispute the equitable claims. Because Plaintiff failed to raise these claims below, we do not reach them now. Singleton v. Wulff, 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976).

3. Plaintiff's argument that her claims for intentional or negligent infliction of emotional distress are subject to a two-year statute of limitations also fails. To the extent that Plaintiff is seeking to raise claims for intentional or negligent infliction of emotion distress for the first time on appeal, her claims are waived. *Id.*; *see also Hac v. Univ. of Haw.*, 102 Haw. 92, 73 P.3d 46, 58-59 (Haw. 2003) (holding that a tort claim for intentional infliction of emotional distress is distinct from a claim for emotional distress damages under the employment discrimination statute). To the extent that Plaintiff is arguing that the 180-day administrative filing period applicable to claims under Hawaii Revised Statutes section 378-2 does not apply when the plaintiff seeks emotional distress damages as a remedy for a violation

of section 378-2, her argument fails. Notwithstanding the remedies sought, claims under section 378-2 are governed by a 180-day administrative filing requirement. Haw. Rev. Stat. § 368-11(c)(1); *Furukawa v. Honolulu Zoological Soc'y*, 85 Haw. 7, 936 P.2d 643, 654 (Haw. 1997).

AFFIRMED.

Footnotes

This disposition is not appropriate for publication and is not precedent except as provided by **Ninth Circuit Rule 36-3**.

Civil No. 07-00357 JMS/BMK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

SHANNON HORITA, Plaintiff,

vs.

KAUAI ISLAND UTILITY COOPERATIVE,
Defendant.

Filed 08/22/08

J. Michael Seabright, United States District Judge.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY

I. INTRODUCTION

Plaintiff Shannon Horita ("Plaintiff") sued her former employer Defendant Kauai Island Utility Cooperative ("Defendant" or "KIUC") for violations of Title VII and Hawaii Revised Statutes ("HRS") § 378-2, alleging that she was demoted and terminated based on race, national origin, and sex. Defendant moves for summary judgment on the grounds that Plaintiff failed to timely exhaust administrative remedies, and that there is no evidence of discriminatory animus linked to any employment decision relating to Plaintiff. Based on the following, the court GRANTS Defendant's motion.

II. BACKGROUND

Plaintiff, a Japanese-American female, was employed by Defendant as an administrator in its Human Resources department. Although Plaintiff began as a temporary clerk in 2004, she applied for and was offered a full time position as Human Resources Administrator on June 10, 2005 at a salary of $50,042 per year at grade level 9. The offer was later revised on June 30, 2005, and Plaintiff's salary was reduced to $40,709 by KIUC CEO Dutch Achenbach ("Achenbach"). In August 2005, Plaintiff received a positive job performance review from Darney Proudfoot, the head of the Human Resources department.

In April 2005, Achenbach announced that the National Rural Electric Cooperative Association ("NRECA") would be conducting an organizational assessment of KIUC. On September 2, 2005, Achenbach advised that the Human Resources department would be outsourced at the recommendation of NRECA, and that two department positions -- those held by Plaintiff and Marcia Shimokawa -- would be downgraded. Pl.'s Decl. ¶ 17. Achenbach further explained that if the Human Resources Department remained in-house instead of being outsourced, Plaintiff and Shimokawa could regain their jobs. Id. According to Plaintiff, she "received a letter dated September 28, 2005 from Achenbach, informing me that my position would be eliminated on December 31, 2005; thus I would be laid off effective January 1, 2006." Id. ¶ 20. On October 5, 2005, Achenbach sent Plaintiff another letter with the subject line "Employment status," which stated:

> Effective January 1, 2006, your current position will no longer exist. We are offering you a position in the Member Services department as

> an Administrative Assistant. Your monthly salary will remain at $3,392.42 at grade level 5. . . . If you decide to accept the position of Administrative Assistant, your employment date in this position will be on October 11, 2005. If you do not accept this position, you are free to bid for another vacancy in the company prior to being displaced on January 1, 2006.

Pl.'s Ex. J. Plaintiff responded to the letter in a memo to Achenbach stating: "Thank you for your memo of October [5], 2005, informing me that my current position will no longer exist as of January 1, 2006," and rejecting the position offered. Pl.'s Ex. K. After this notice, Plaintiff did not apply for any open positions at KIUC, either in the Human Resources department or elsewhere at the company. Def.'s Ex. A at 103. In the end, KIUC did not outsource the Human Resources department. Pl.'s Decl. ¶ 20.

On October 12, 2005, Randy Hee ("Hee"), Chief Operating Officer of KIUC, directed Plaintiff and Shimokawa to relocate their work stations to an open reception area in order to make room for the legal department. On October 24, 2005, Hee informed Plaintiff that she would report to the new Utility Attorney,

Karen Baldwin ("Baldwin"), effective October 31, 2005. According to Plaintiff, on November 2, 2005, Baldwin took her around the workplace and pointed out what she wanted cleaned in the employee lounge, women's locker room, and kitchen area. Id. ¶ 27. When Baldwin later asked her if the work had been done, Plaintiff replied that she had more important work to do, and

that janitorial work was not part of her normal job duties. Id.

On November 18, 2005, Plaintiff received a written warning from Baldwin for being unfriendly and unhelpful to employees, and for refusing to update and revise material in the lunch room. Pl.'s Ex. L. According to Plaintiff, she did not receive a prior verbal warning, and the warning letter placed her one step away from being terminated for cause. Pl.'s Decl. ¶ 28. The next day, Plaintiff saw her doctor for anxiety symptoms she developed during November 2005, id. ¶ 30, and submitted a physician's note indicating that she was unable to work from November 21, 2005 to January 3, 2006. Id. ¶ 31; Pl.'s Ex. M.

Plaintiff received a letter from Baldwin dated December 20, 2005, stating:

> As Mr. Achenbach informed you in his letter of September 28, 2005, your position in Human Resources will be eliminated December 31, 2005. Therefore effective January 1, 2006, you will be laid off. You were offered the opportunity to apply and interview for various open positions. You have chosen not to apply for any positions.

Pl.'s Ex. O. Plaintiff's employment at KIUC was terminated on January 1, 2006.

Plaintiff claims that the adverse employment actions she suffered were the result of Achenbach's discriminatory animus against Asians and females. Plaintiff claims that when her salary and grade were

downgraded, Achenbach told Shimokawa that Plaintiff "walked like a sumo person." Pl.'s Decl. ¶ 12. Plaintiff also claims that only her position and Shimokawa's position were downgraded in September 2005, and that both are females of Japanese descent. According to Plaintiff, in September 2005, Anne Barnes told Shimokawa that Achenbach told her that he did not like Japanese. Id. ¶ 21. Barnes also states that Achenbach once referred to another KIUC employee, Faye Akasaki, "as a slanty-eyed Jap. bitch." Pl.'s Ex. Y at 17. According to William Schmidt, formerly Chief Financial Officer of KIUC, Achenbach was "difficult to support, because of the constant threats and intimidation he projected towards employees of Asian descent and women," that "[o]n a daily basis, [he] heard Achenbach use racial and sexist comments about people," and that Achenbach directed the "racial slurs primarily against the Japanese and women." Schmidt Decl. ¶¶ 10, 13, 14. Plaintiff does not allege that Baldwin ever made any racist or sexist comments.

Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on September 21, 2006. Pl.'s Ex. X. Plaintiff filed her Complaint in this court on July 3, 2007, alleging violations of Title VII and HRS § 378-2 based on race, national origin, and sex discrimination. Defendant filed a Motion for Summary Judgment on May 21, 2008. Plaintiff filed an Opposition on August 1, 2008, and Defendant filed a Reply on August 8, 2008.

A hearing was held on August 19, 2008.

III. STANDARD OF REVIEW

Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The burden initially lies with the moving party to show that there is no genuine issue of material fact. T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). Nevertheless, "summary judgment is mandated if the non-moving party 'fails to make a showing sufficient to establish the existence of an element essential to that party's case.'" Broussard v. Univ. of Cal. at Berkeley, 192 F.3d 1252, 1258 (9th Cir. 1999) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

An issue of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is material if the resolution of the factual dispute affects the outcome of the claim or defense under substantive law governing the case. See Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 919 (9th Cir. 2001). When considering the evidence on a motion for summary judgment, the court must draw all reasonable inferences on behalf of the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

IV. ANALYSIS

A. Timeliness of Plaintiff's EEOC Complaint

Plaintiff must exhaust her administrative remedies by timely filing a claim with the EEOC prior to filing suit in federal court. 42 U.S.C. § 2000e-5(b); Vasquez v.

County of L.A., 349 F.3d 634, 644 (9th Cir. 2003); B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1099 (9th Cir. 2002); Sosa v. Hiraoka, 920 F.2d 1451, 1456 (9th Cir. 1990). "Discrimination claims under Title VII ordinarily must be filed with the EEOC within 180 days of the date on which the alleged discriminatory practice occurred. However, if the claimant first 'institutes proceedings' with a state agency that enforces its own discrimination laws -- a so-called 'deferral' state -- then the period for filing claims with the EEOC is extended to 300 days." Laquaglia v. Rio Hotel & Casino, Inc., 186 F.3d 1172, 1174 (9th Cir. 1999) (citations omitted); see also 42 U.S.C. § 2000e-5(e)(1).

Hawaii is a deferral state. See 29 C.F.R. §§ 1601.80, 1601.13; Beaulieu v. Northrop Grumman Corp., 161 F. Supp. 2d 1135, 1141 (D. Haw. 2000). Thus, because the EEOC defers jurisdiction to the Hawaii Civil Rights Commission ("HCRC"), the 300-day period applies "regardless of whether the complaint was first received by the EEOC or the state." Bouman v. Block, 940 F.2d 1211, 1220 (9th Cir. 1991). Because Plaintiff filed a complaint with the EEOC on September 21, 2006, the 300-day statute of limitations bars claims that accrued before November 25, 2005.[1]

Defendant argues that Plaintiff complains of no acts of discrimination that fall within the 300-day period. Where a plaintiff alleges "a series of discrete discriminatory acts," each of which was "independently identifiable and actionable," the plaintiff must timely file an EEOC charge with respect to each discrete violation. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2175-76 (2007). Where a plaintiff alleges "a single wrong consisting of a succession of acts," at

least one of the discriminatorily-motivated acts predicate to the claim must have occurred within the limitation period. Id. at 2175 n.7. Ledbetter "reiterated the distinction between a continuing violation and continual effects when it held that 'current effects alone cannot breathe life into prior, unchanged discrimination; . . . such effects in themselves have no present legal consequences.'" Garcia v. Brockway, 503 F.3d 1092, 1098 (9th Cir. 2007)(quoting Ledbetter, 127 S. Ct. at 2169).

In this case, none of the acts alleged to have been discriminatory occurred within the limitation period, including Plaintiff's reduction in pay on June 30, 2005, the September 2005 downgrade of her position, notification on October 5, 2005 that her position would be eliminated effective January 1, 2006, the October 12, 2005 relocation of her workspace, and the November 18, 2005 disciplinary action. Plaintiff claims, however, that the termination notice dated December 20, 2005 stating that her position had been eliminated and that she would be laid off is a discrete act that falls outside the limitations period. Defendant argues that because Plaintiff was notified that her position would be eliminated in the October 5, 2005 memo, her claim accrued on that date.

Delaware State College v. Ricks, 449 U.S. 250, 259 (1980), held that Title VII's "limitations period commence[s] to run when the [employement] decision was made and [the employee] was notified," rather than the date on which the employee's position ended. In Ricks, a college teacher who had been denied tenure brought a Title VII action contending that the limitations period did not begin to run until his

employment contract expired and his employment terminated. The Supreme Court rejected the employee's argument, concluding instead that the limitations period began to run when the employee was earlier told that he had been denied tenure. Ricks identified the alleged act of discrimination as the date the "tenure decision was made and communicated to" the employee and that the "termination of employment at Delaware State is a delayed, but inevitable, consequence of the denial of tenure." Ricks, 449 U.S. at 257-58. The Court emphasized that:

> the only alleged discrimination occurred -- and the filing limitations periods therefore commenced -- at the time the tenure decision was made and communicated to Ricks. That is so even though one of the effects of the denial of tenure – the eventual loss of a teaching position -- did not occur until later. The Court of Appeals for the Ninth Circuit correctly held, in a similar tenure case, that "[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful." Abramson v. University of Hawaii, 594 F.2d 202, 209 (1979) (emphasis added); see United Air Lines, Inc. v. Evans, 431 U.S., at 558, 97 S. Ct., at 1889. It is simply insufficient for Ricks to allege that his termination "gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination." Id. at 557, 97 S. Ct. at 1888. The emphasis is not upon the effects of earlier employment decisions; rather, it "is [upon] whether any present violation exists."

Id. at 258.

Following Ricks, the Ninth Circuit held in Aronsen v. Crown Zellerbach, 662 F.2d 584, 593 (9th Cir. 1981), that the "inquiry for purposes of determining when the limitations period begins to run must center on the date when the employee has notice of the unlawful act; neither cessation of work nor official termination noted on company personnel records is singularly relevant to this inquiry." Aronson did not read into Ricks "a requirement that employers provide express written notice of termination in every case," but observed that "an employer's letter to Ricks provided explicit notice that his employment would end upon (the terminal contract's) expiration." Id. at 594 (citation and quotation signals omitted).

Finally, the Ninth Circuit recently addressed accrual of claims for statute of limitations purposes in Lukovsky v. City & County of San Francisco, ---F.3d ---, 2008 WL 3091265 (9th Cir. Aug. 7, 2008), stating "[a]ccrual is the date on which the statute of limitations begins to run; under federal law, a claim accrues when the plaintiff knows of or has reason to know of the injury which is the basis of the action." Lukovsky, 2008 WL 3091265, at *2 (citation and quotation signals omitted). The court further found that, consistent with Ricks, "the claim accrues upon awareness of the actual injury, i.e., the adverse employment action, and not when the plaintiff suspects a legal wrong." Id. at *3-4.

Plaintiff does not contest that she was first informed in September and October 2005 -- outside of the limitations period -- that her position would be eliminated and that she would no longer have a job. Cf.

Aronsen, 662 F.2d at 594 (concluding that where the employee denied that he was informed of his termination before the limitations period ran, "a factual dispute exists on the issue whether [the employee] knew or should have known . . . that he was being terminated or that he was being subjected to an unlawful practice"). Plaintiff knew by at least October 5, 2005 that her employment would cease on January 1, 2006 because her position was eliminated and she refused Defendant's offer of another position. Thus, she had actual knowledge of the adverse employment action by October 5, 2005.

The court rejects Plaintiff's argument that her EEOC complaint was timely as to the December 20, 2005 notice based on Achenbach's September 2, 2005 statements that "if Human Resources were to remain in-house we would be able to get our jobs back." Pl.'s Decl. ¶ 17. Plaintiff admits that she understood, in fact, that she would be laid off based on Achenbach's subsequent September 28, 2005 letter:

> I received a letter dated September 28, 2005 from Achenbach, informing me that my position would be eliminated on December 31, 2005; thus I would be laid off effective January 1, 2006.

Id. ¶ 20. There is no indication that the elimination of Plaintiff's position was related to the Human Resources department being outsourced. Further, the October 5, 2005 letter from Achenbach, with the subject line "Employment status," states: "Effective January 1, 2006, your current position will no longer exist," with no mention of outsourcing as the cause of her position being eliminated. Pl.'s Ex. J. Thus, with respect to the

September 28, 2005 and October 5, 2005 letters, there is no evidence that Plaintiff's termination was conditioned upon whether KIUC outsourced the Human Resources department. Further, the notifications on September 28, 2005 and October 5, 2005 occurred after Achenbach's statements on September 2, 2005. Thus, Plaintiff knew or should have known of the injury caused by her termination when she was first notified on September 28, 2005 and October 5, 2005, regardless of the earlier September 2, 2005 statements about outsourcing.

Also without merit is Plaintiff's argument that because she could have applied for jobs up until December 31, 2005, her injury did not occur until her position was actually terminated on that date. Although Plaintiff received her final termination notice on December 20, 2005, the "inquiry for purposes of determining when the limitations period begins to run must center on the date when the employee has notice of the unlawful act; neither cessation of work nor official termination noted on company personnel records is singularly relevant to this inquiry." Aronsen, 662 F.2d at 593. The October 5, 2005 letter offered Plaintiff a position in the Member Services department, which she rejected. Id. Plaintiff responded to the letter in a memo to Achenbach stating: "Thank you for your memo of October [5], 2005, informing me that my current position will no longer exists as of January 1, 2006." Pl.'s Ex. K. Plaintiff indicated that she might be willing to consider another position in Human Resources, id., but admitted that she did not apply for any other positions at KIUC before January 1, 2006. Def.'s Ex. A at 103. Plaintiff did not apply for another position and she knew the consequences of failing to do so; that is, she knew that

she would be laid off on January 1, 2006 if she did not apply for and accept another job at KIUC.[2] Even though Plaintiff could have applied for another position up to December 31, 2005, the fact remains that she was told that her position was being terminated no later than October 5, 2005. Thus, the possibility that Plaintiff could have applied for another position in the future is irrelevant.[3]

In sum, none of the discrete acts of discrimination complained of by Plaintiff occurred within the 300-day limitations period -- all occurred before November 25, 2005. Therefore, Plaintiff's claims are untimely for failure to exhaust within the 300-day period. The court GRANTS Defendant's Motion for Summary Judgment as to Plaintiff's Title VII claims.

B. Timeliness of Plaintiff's State Law Claim

The HCRC has a 180-day statute of limitations provision for state law claims. See HRS §§ 368-11(c), 368-12; Ross v. Stouffer Hotel Co., 76 Haw. 454, 460, 879 P.2d 1037, 1043 (1994). A complaint alleging unlawful discrimination must be filed "within 180 days after either the occurrence of the alleged discriminatory practice or the last occurrence in a pattern of ongoing discriminatory practice." Sam Teague, Ltd. v. Haw. Civil Rights Comm'n, 89 Haw. 269, 276, 971 P.2d 1104, 1111 (1999). Plaintiff does not contest Defendant's showing that she did not timely file a complaint within the 180-day period. The court GRANTS Defendant's Motion for Summary Judgment on Plaintiff's HRS § 378-2 claim.

Because the court grants Defendant's Motion for Summary Judgment based on the federal and state statutes of limitations, the court does not address Defendant's remaining arguments.

V. CONCLUSION

Based on the foregoing, the court GRANTS Defendant's Motion for Summary Judgment on all claims. The Clerk of Court is directed to close the case. IT IS SO ORDERED.

Footnotes

1

1Although Plaintiff's brief states that she filed her EEOC complaint on September 10, 2006, see Pl.'s Opp'n 12, she acknowledged at the August 19, 2008 hearing that this was an error. Plaintiff agreed that the filing date was September 21, 2008.

2Further, despite Plaintiff's argument at the August 19, 2008 hearing, there is no evidence in the record that Plaintiff was prevented from or unable to apply for positions when she was out on sick leave beginning November 21, 2005.

3 Plaintiff's reliance on National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), is also misplaced. Although Morgan held that the "existence of past acts . . . does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed," none of the

discrete acts complained of by Plaintiff was timely filed. Morgan, 536 U.S. at 113 (emphasis added).

/s/ J. Michael Seabright

J. Michael Seabright
United States District Judge

Filed: 12/22/2009
No. 08-17166
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHANNON C. HORITA, Plaintiff - Appellant,
v.
KAUAI ISLAND UTILITY COOPERATIVE, a Hawaii corporation, Defendant - Appellee.

October 14, 2009, Argued and Submitted, Honolulu, Hawaii
November 9, 2009, Filed

ORDER

Before: BEEZER, GRABER, and FISHER, Circuit Judges.

Judges Beezer and Graber have voted to deny the petition for panel rehearing, and Judge Fisher has voted to grant it. Judges Graber and Fisher have voted to deny the petition for rehearing en banc, and Judge Beezer has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

The petition for panel rehearing and petition for rehearing en banc are DENIED.

Supreme Court, U.S.
FILED
MAY 17 2010
OFFICE OF THE CLERK

No. 09-1245

IN THE
Supreme Court of The United States

SHANNON C. HORITA,

Petitioner,

v.

KAUAI ISLAND UTILITY COOPERATIVE,
A HAWAII CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals correctly refuse to reach Petitioner's claims of equitable tolling and/or equitable estoppel because she failed to raise them below before the district court?

2. Did the court of appeals correctly apply *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980) to determine that Petitioner's Title VII claim was barred by her failure to timely file an administrative charge, or should it instead have applied a rule adopted by a minority of the state courts interpreting state law and raised for the first time by Petitioner in her Petition for Writ of Certiorari?

RULE 29.6 DISCLOSURE STATEMENT

Respondent KAUAI ISLAND UTILITY COOPERATIVE, a Hawaii corporation, has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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JURISDICTION

Respondent Kauai Island Utility Cooperative ("Respondent" or "KIUC") agrees with Petitioner Shannon Horita's ("Petitioner" or "Horita") Statement of Jurisdiction, set forth in her Petition for Writ of Certiorari, filed on April 6, 2010 and placed on the docket April 15, 2010. However, Respondent notes that Petitioner's Petition for Panel Rehearing and Rehearing En Banc was filed on November 20, 2009, not November 26, 2009.

COUNTER-STATEMENT

This case arose from the elimination of Petitioner's position as an administrator in Respondent's Human Resources Department. Petitioner was notified of the decision to eliminate her position on September 28, 2005 and also on October 5, 2005. She did not file her Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") and the Hawaii Civil Rights Commission ("HCRC") until September 21, 2006, approximately 350 days after she had been notified of the decision. The district court granted Respondent's motion for summary judgment because Petitioner failed to timely file an administrative charge of discrimination and the court of appeals affirmed. The court of appeals denied Petitioner's request for panel rehearing and rehearing *en banc*.

1. Factual Background Relevant to the Petition. Petitioner was employed by Respondent as an administrator in its Human Resources Department.

Petitioner initially began in January 2004 as a temporary clerk in a position that was only intended to last two to three weeks. In April 2005, Petitioner considered submitting her resignation because she had work commitments with another company. Respondent's CEO Dutch Achenbach ("Achenbach") allowed Petitioner to instead take a leave of absence, a benefit which Petitioner admits Respondent had no obligation to provide.

At a company meeting on April 19, 2005, Achenbach announced that the National Rural Electric Cooperative Association ("NRECA") would be conducting an organizational assessment. Petitioner knew that as a result of the organizational assessment some people might be moved into different positions and that she could be one of those people. Darnney Proudfoot ("Proudfoot"), Respondent's Vice President of the Human Resources Department, told Petitioner that Achenbach had said that he might not be able to keep Petitioner's position, but Proudfoot told Petitioner that she was trying to justify another full time position. The new full time position of Human Resources Administrator was subsequently created. Petitioner applied for, and in June 2005 she was offered, the position at a salary of $50,042 per year graded at exempt level 9. By letter dated June 30, 2005, that offer was revised downward to $40,709 and Petitioner was told that the grade level was to be determined at a later date. Petitioner claims that Achenbach commented to Petitioner's co-worker that Petitioner walked like a "sumo-person."

On September 2, 2005 Achenbach advised Petitioner that the Human Resources Department would be outsourced at the recommendation of NRECA. Petitioner contends that Achenbach also stated that if the Human Resources Department were not outsourced, then Petitioner could regain her job. On September 28, 2005, Petitioner received a letter from Achenbach stating that her position would be eliminated effective December 31, 2005. Achenbach sent Petitioner another letter on October 5, 2005 again advising her that her position would no longer exist as of January 1, 2006. In his October 5, 2005 letter Achenbach offered Petitioner the opportunity to transfer to another position in the Member Services Department at the same rate of pay that she was earning at that time. Petitioner declined the offer. Although a number of positions were later posted, Petitioner did not apply for any of them.

Petitioner contends that on October 12, 2005 she and a co-worker were instructed to relocate their work stations to make room for the legal department. Petitioner was given a written warning on November 18, 2005 for being unhelpful and unfriendly, a characterization of her conduct that she has not disputed.

After being given the written warning, Petitioner claimed that she was experiencing stress and did not return to work. On or about December 20, 2005, Petitioner was reminded by letter that she would be laid off effective January 1, 2006.

2. Proceedings Below. Respondent filed its Motion for Summary Judgment on May 21, 2008. In Petitioner's August 1, 2008 Memorandum in Opposition to [Respondent's] Motion for Summary Judgment, Petitioner never raised the issues of equitable tolling and/or equitable estoppel. (Respondent's ["Resp."] Brief, at Appendix ["App."] 1a-14a). The district court granted Respondent's Motion for Summary Judgment and filed its Order Granting [Respondent's] Motion for Summary Judgment on August 22, 2008. The district court applied the rule articulated by the United States Supreme Court in *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980), and held that the limitations period began to run no later than October 5, 2005, the date that Petitioner was notified that her position would be eliminated. The district court concluded that Petitioner had not timely filed a charge of discrimination.

The court of appeals affirmed the district court's grant of summary judgment. The court of appeals did not reach Petitioner's claim of equitable tolling or equitable estoppel, noting that Petitioner "did not make these claims explicitly to the district court. Had she done so, [Respondent] might have introduced evidence to dispute the equitable claims. Because [Petitioner] failed to raise these claims below, we do not reach them now." (Petitioner's ["Pet."] Brief, at Appendix ["App."] 3a). The court of appeals denied Petitioner's request for panel rehearing and rehearing *en banc*. (Pet. Brief, at App. 20a).

SUMMARY OF ARGUMENT

Petitioner asserted in her Complaint that she was discriminated against in violation of Title VII.[1] To proceed with a statutory discrimination claim under Title VII, a plaintiff must file an administrative charge of discrimination within 300 days. The limitations period begins to run when the employment decision is made and the employee is notified. *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980). It is undisputed that Petitioner was notified by letter dated September 28, 2005 and again by memorandum dated October 5, 2005 that her position would be eliminated effective December 31, 2005. Petitioner's claim under federal law is therefore time-barred because both dates fall outside the limitations period.

Petitioner now argues that her claim is not time-barred because (1) the limitations period should be equitably tolled or equitably estopped to mitigate the harsh effects of *Ricks* and *Chardon v. Fernandez*, 454 U.S. 6, 102 S. Ct. 28, 70 L. Ed. 2d 6 (1981), and (2) this Court should overturn *Ricks* and *Chardon*, and instead should apply a rule followed by a minority of state courts which have held that the date of termination and not notification of termination should be the date that the statute of limitations begins to run.

---

[1] Petitioner also asserted a state law claim under Chapter 378 of the Hawaii Revised Statutes. However, she is not appealing this claim in her Petition for Writ of Certiorari. (Pet. Brief, at i, 1-30).

This Court should not address Petitioner's first argument because the court of appeals correctly refused to address the arguments of equitable tolling and equitable estoppel as Petitioner had not raised them before the district court. Petitioner's second argument also fails because the district court applied and the court of appeals affirmed the application of the well-established precedent of *Ricks* holding that the limitations period begins to run when the employment decision is made and the employee has been notified of the decision. Furthermore, this Court should not follow a rule adopted by a minority of state courts interpreting state law and raised for the first time by Petitioner in her Petition for Writ of Certiorari.

REASONS FOR DENYING THE PETITION

A. The Court of Appeals Correctly Refused to Reach Petitioner's Claims of Equitable Tolling and/or Equitable Estoppel Because Petitioner Failed to Make These Claims Explicitly to the District Court

Petitioner never argued before the district court that the doctrines of equitable tolling and/or estoppel should apply. (Resp. Brief, at App. 1a-14a). The Court of Appeals did not reach Petitioner's claims of equitable tolling and/or equitable estoppel, as it determined that Petitioner "did not make these claims explicitly to the district court." (Pet. Brief, at App. 3a).

Absent exceptional circumstances, this Court will not decide questions not raised or resolved below. *Youakim v. Miller*, 425 U.S. 231, 234, 96 S. Ct. 1399, 47 L. Ed. 2d 701 (1976) (per curiam) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court[s]."); *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not pressed upon below."). Here, any argument that Petitioner's claims should be equitably tolled or equitably estopped has been waived as a result of her failure to raise the argument below. *See Singleton*, 428 U.S. at 120. Petitioner has not presented any exceptional circumstances that explain why she was unable to raise her arguments with the district court. Therefore, the court of appeals correctly refused to reach this argument.

B. The Court of Appeals Properly Applied Precedent in Affirming Summary Judgment in Favor of Respondent on the Basis that Petitioner's Title VII Claim was Barred by Her Failure to Timely File an Administrative Charge

Petitioner urges this Court to overturn *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980) and *Chardon v. Fernandez*, 454 U.S. 6, 102 S. Ct. 28, 70 L. Ed. 2d 6 (1981). Under *Ricks*, Petitioner's charge of discrimination was clearly untimely because it was filed more than

300 days after she had notice of the termination decision.

With a novel argument never raised with the district court and never raised with the Ninth Circuit Court of Appeals, Petitioner urges this Court to apply a rule followed by a minority of state courts which have held that the date of termination and not notification of termination should be the date that the statute of limitations begins to run. (Pet. Brief, at 24-29). In making this argument, Petitioner fails to offer any coherent argument in favor of abandoning well established Supreme Court precedent that has been consistently followed by the federal courts of appeal.

For the first time in her Petition, Petitioner argues that the limitations period began to run on December 31, 2005, her termination date. At every prior stage in this litigation, Petitioner has argued that a different date triggered the running of the limitations period. (Resp. Brief, at App. 1a-49a; Pet. Brief, at App. 10a-19a). Petitioner previously argued with the lower courts that the statute began to run on December 20, 2005, the date of the letter from Respondent reminding Petitioner that she would be laid off as of January 1, 2006. (*Id.*) Any argument that the date of termination rule followed by a minority of state courts should now apply has been waived as a result of Petitioner's failure to raise the argument below. *See Singleton*, 428 U.S. at 120 ("It is the general rule, of course, that a federal appellate court does not consider an issue not pressed upon below"); *Youakim*, 425 U.S. at 234 (internal and

external citations omitted) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court ... 'It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed'").

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 07-00357 JMS BMK

SHANNON C. HORITA,

Plaintiff,

v.

KAUAI ISLAND UTILITY
COOPERATIVE, a Hawaii corporation,

Defendant.

MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT

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II.
ARGUMENT

A. Summary Judgment, Generally

Summary Judgment is proper:

> if no factual issues exist for trial. The party opposing summary judgment must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

Lindahl v. Air France, 930 F.2d 1434, 1437 (9th Cir. 1991) (quoting, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986)).

The evidence of the opposing party is to be believed, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in the light most favorable to the nonmoving party. *Id.* (quoting, *Anderson*, 930 U.S. at 255, 106 S.Ct. at 2513).

Generally, a plaintiff in an employment discrimination action needs to produce very little evidence in order to overcome the employer's motion for summary judgment. *Chuang v. Univ. of California Davis*, 225 F.3d 1115 (9th Cir. 2000). This

is because the ultimate question is one that can only be resolved through a searching inquiry, one that is most appropriately conducted by a fact-finder, upon a full record. *Id.* at 1124. Once plaintiff has established a prima facie case, the burden of production shifts to the defendant to rebut the presumption of discrimination by articulating some permissible reason for the adverse action. *Id.*

B. Title VII, Generally

1. Race and National Origin

Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq,* prohibits racial and national origin discrimination by an employer against any individual with respect to his compensation, terms, conditions or privileges of employment. *See,* 42 U.S.C. § 2000e 2(a) (1).

A disparate treatment claim under Title VII uses the three-step *McDonnell Douglas* test. The plaintiff must first establish a prima facie case of discrimination consisting of the following elements: (1) plaintiff belongs to a protected class; (2) he was performing his job satisfactorily; and (3) he suffered an adverse employment action or was treated less favorably than others. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 36 L.Ed. 2d 668, 93 S.Ct. 1817 (1973). If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its adverse employment decisions. *Id.* Once the defendant satisfies this burden, the plaintiff must demonstrate that the employer's alleged reason for

the adverse employment decision is a pretext for a discriminatory motive. *Id.* at 804.

To preclude summary judgment, the employee, even if he establishes a prima facie case, must come forward with specific, substantial evidence of pretext *Wallis v. J.R. Simplot Co.,* 26 F.3d 885, 888 (9th Cir. 1994). "In other words, the plaintiff must tender a genuine issue of material fact as to pretext in order to avoid summary judgment." *Id.* at 890 (internal quotations and citation omitted). A claim of disparate treatment typically requires that the plaintiff present direct or circumstantial proof of a discriminatory motive. *Pejic v. Hughes Helicopters, Inc.,* 840 F.2d 667, 672 (9th Cir 1988). Evidence that a plaintiff was treated differently than others outside of his class is circumstantial proof of discriminatory motive. *Id.*

i. Race-Based Remarks

In *Galdamez v. Potter,* 415 F.3d 1015 (9th Cir. 2005), a Title VII race and national origin harassment case, the Ninth Circuit noted that there are no "talismanic expressions" of racial animus necessary to sustain a harassment claim, and recognized that racially charged "code words" may provide evidence of discriminatory intent by sending a clear message and carrying the distinct tone of racial motivations and implications. *Id.* at 1024 n.6; *see also, Mustafa v. Clark County School Dist.,* 157 F.3d 1169, 1180 (9th Cir. 1998)(Discriminatory remarks are relevant evidence that, along with other evidence, can create a strong inference of intentional

discrimination.)

In *Galdamez,* the Ninth Circuit noted that the term "redneck" appeared several times in the record of that case, and can suggest racial hostility toward plaintiff-employee, a Hispanic born in Honduras. *Galdamez,* 415 F.3d at 1024; *see also, State v. Kuhia,* 105 Haw. 261, 96 P.3d 590, n.4 (Haw. App. 2004), citing, Mary K. Pukui and Samuel H. Elbert, Hawaiian Dictionary 58 (1986) ("Haole" is a Hawaiian word for "Caucasian.")

2. Gender

In the recent case of *Davis v. Team Electric,* 520 F.3d 1080 (9th Cir. 2008), the Court found that a female electrician had established a prima facie case of gender discrimination, where unlike her male co-workers, she was prohibited from entering a trailer to take breaks or to talk with her superintendent about work matters and she was ignored by her supervisors when she attempted to communicate with them by radio. The court found that such actions together with discriminatory work assignments, materially affected the terms and conditions of her employment.

C. Horita's Discrimination Complaint to the Equal Employment Opportunity Commission Was Timely

Defendant has alleged that Horita's complaint is untimely in that it was not filed 300 days after June 30, 2005, the date when Achenbach effected the reduction of Horita's compensation. However, the

Defendant acknowledges that on November 18, 2005, Baldwin served Horita with an Employee Counseling Report and that on December 20, 2005, Baldwin sent Horita a termination notice stating that Horita's position with KIUC had been eliminated and that she would be laid off, effective January 1, 2006. Horita filed her discrimination complaint with the Equal Employment Opportunity Commission on September 10, 2006. (Ex. "X" to Concise Statement.)

Defendant's reliance on *Ledbetter v. The Goodyear Tire and Rubber Co., Inc.,* 127 S.Ct. 2162 (Sup. Ct. 2007) is misplaced. In *Ledbetter,* the complainant did not assert that the relevant Goodyear decision makers acted with discriminatory intent during the EEOC charging period or when they denied her a raise within 300 days of her discrimination complaint. Instead, the Complainant argued that her paychecks would have been larger if she had been evaluated in a nondiscriminatory manner prior to the EEOC charging period.

Horita would submit that the Supreme Court's holding in *National Railroad Passenger Corp. v. Morgan,* 536 U.S. 101, 122 S.Ct. 2061 (Sup. Ct. 2002) is applicable to the instant case. Rejecting the Appeals Court's holding that continuing violations for "serial violations" was the appropriate test, the Supreme Court stated in pertinent part:

> Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180- or 300-day time period after the discrete

> discriminatory act occurred. The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed. Nor does the statute bar an employee from using the prior acts as background evidence in support of a timely claim.

536 U.S. 101 at 113.

D. Horita's Evidence of Discriminatory Bias

Horita would submit that she has presented sufficient evidence to prove that the treatment she received at KIUC, culminating with her termination on December 20, 2005, was the result of race, national origin and gender bias. William Schmidt has submitted a Declaration stating that Achenbach made racial and sexist statements about persons on a daily basis, that Achenbach made negative statements about Japanese men and women, referencing their ethnic backgrounds and had targeted Darnney Proudfoot, Marcia Shimokawa and Shannon Horita for termination.

Faye Akasaki has testified that she is a Japanese American woman who retired as the Vice President-Membership Services. Ms. Akasaki has testified that she was informed by a KIUC employee that Achenbach called her a "slanty eye Jap." Akasaki finally has testified that her Department did not receive raises in 2005, a fact that factored into her

decision to retire.

Darnney Proudfoot, a Chinese-American woman, the former Vice President, Human Resource Department, has testified that in June 2005, she was told by Achenbach that she need not come to work as her employment contract with KIUC would not be extended. Ms. Proudfoot was told that the reason for the non-renewal of her contract was that the Human Resource Department would be outsourced.

Ms. Proudfoot left KIUC on a severance package in October 2005. The Human Resource Department was not outsourced. Ms. Proudfoot's replacement was hired in December 2005.

Kathy Williams, a Caucasian employee of KIUC was told by Achenbach that she would not get ahead in KIUC because she was the "wrong color." Achenbach, like Williams, is Caucasian.

Horita has offered evidence that her pay was reduced approximately $10,000.00 in June 2005. She was required to vacate her office in October 2005 and her work station was placed in the reception area of KIUC office. On November 2, 2005, she was ordered to do janitorial work, and after Achenbach told Baldwin that he had received complaints that Horita was unfriendly and not helpful to KIUC employees, she was disciplined. Finally, on December 20, 2005, despite the fact that the Human Resource Department was not going to be outsourced, KIUC eliminated Horita's position and terminated her.

In *Estes v. Dick Smith Ford*, 856 F.2d 1097 (8th

Cir. 1998), the Appeals Court found that it was probative to a claim of racial discrimination evidence that the employer had excluded blacks from its workforce, that the employer had fired two other employees because of their ages, that the employer had treated white customers more favorably than black customers and that the employer's managers had referred to blacks and Complainant as "damn niggers." Likewise in *White v. Honeywell, Inc.* 141 F.3d 1270 (8th Cir. 1998), the Court held that it was error for the trial court to exclude the statement, "If the dumb nigger doesn't like it she can sign out," stating that though the statement was not actionable in that it fell outside the time limitations, the trial court committed reversible error in excluding it at trial. *See also*, *Robinson v. Runyon*, 149 F.3d 507 (6th Cir. 1998).

In *Kientzy v. McDonnell Douglas*, 990 F.2d 1051 (8th Cir. 1993) the Court of Appeals, affirming a jury verdict of discrimination held that evidence that the supervisor had deviated from the practice and procedure that he had utilized for disciplining male security guards, when he disciplined a female guard, was probative to establish discriminatory bias.

E. Horita's Discipline and Termination Can Be Traced to Harry Achenbach

Harry Achenbach was the CEO of KIUC. Achenbach made the decision to propose the outsourcing of the Human Resource Department, which was used to justify the severance agreement with Darnney Proudfoot, a Chinese American

woman. Further, Achenbach made the decision to reduce Horita's salary by approximately $10,000.00 after he had initially approved it.

Achenbach reported employee complaints to Baldwin, which motivated her to issue a Employee Counseling Report on Horita on November 18, 2005. Finally, the termination notice sent to Horita referred to Achenbach's prior decision to eliminate Horita's position and was sent at a time when the Human Resource Department was not being outsourced.

Achenbach called Akasaki a "slanty eye Jap bitch," referred to Horita as a "little sumo wrestler" and made negative statements about Japanese men and women.

In *Shager v. Upjohn Co.*, 913 F.2d 1522 (7th Cir. 1990), Judge Posner coined the term "cat's paw" to reference a case in which the actions of a discriminatory manager is carried out by third party, stating:

> All that follows, though, is that if Lehnst had fired Shager, Asgrow would be liable whether or not anyone else connected with the company was at fault. Lehnst did not fire Shager; the Career Path Committee did. If it did so for reasons untainted by any prejudice of Lehnst's against older workers, the causal link between that prejudice and Shager's discharge is severed, and Shager cannot maintain this suit even if Asgrow is fully liable for Lehnst's wrongdoing. But if Shager's

evidence is believed, as in the present posture of the case it must be, the committee's decision to fire him was tainted by Lehnst's prejudice. Lehnst not only set up Shager to fail by assigning him an unpromising territory but influenced the committee's deliberations by portraying Shager's performance to the committee in the worst possible light. Lehnst's influence may well have been decisive. The committee's deliberations on the question whether to fire Shager were brief, perhaps perfunctory; no member who was deposed could remember having considered the issue. A committee of this sort, even if it is not just a liability shield invented by lawyers, is apt to defer to the judgment of the man on the spot. Lehnst was the district manager; he presented plausible evidence that one of his sales representatives should be discharged; the committee was not conversant with the possible age animus that may have motivated Lehnst's recommendation. If it acted as the conduit of Lehnst's prejudice -- his cat's-paw -- the innocence of its members would not spare the company from liability. For it would then be a case where Lehnst, acting within (even if at the same time abusing) his authority as district manager to evaluate and make recommendations concerning his subordinates, had procured Shager's discharge because of his age. Lehnst would have violated the statute, and his violation would be imputed to Asgrow. The committee would be out of the picture. It would no more be a

> nonconductor, insulating the company from liability for Lehnst's misconduct, than would be the secretary who typed Shaper's discharge papers knowing nothing of the age discrimination that lay behind the discharge.

913 F.2d 398 at 405, (citations omitted).

The proposition that an employer can be liable for the discriminatory bias of a manager who acts through a another manager has been re-affirmed by cases which have adopted the "cat's paw" doctrine. In *Griffin v. Washington Convention Center*, 142 F.3d 1308 (D.C.C.A. 1998) the Appeals Court held that the trial court had improperly excluded evidence of the complainant's supervisor's bias against women, where the employer had conceded that the supervisor had participated in every stage of the process that led to the complainant's termination. Finally, in *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476 (10th Cir. 2006), the Appeals Court reversed an order granting summary judgment to an employer who established that the human resource official who terminated the complainant was not acquainted with the complainant nor had knowledge of his race. The Complainant had established that the human resources official relied exclusively on information provided by complainant's immediate supervisor who not only knew complainant's race, but also been shown to have treated blacks unfavorably.

III.
CONCLUSION

Plaintiff Shannon Horita has established that she was subjected to a disciplinary action initiated at the behest of Harry "Dutch" Achenbach. Horita has further established that Achenbach made the decision to eliminate Horita's employment position at a time when the elimination of Horita's job was no longer justified. Horita was terminated by letter dated December 20, 2005.

Additionally, Horita has proffered evidence which confirms that Achenbach made racist and sexist statements about Japanese women and against herself. Finally, Horita has proffered evidence showing that Achenbach not only treated minority women disparately, but in the instant case, targeted Darnney Proudfoot, Marcia Shimokawa and Shannon Horita, all non-white women, for termination and did in fact cause their termination.

For the foregoing reasons, Horita requests that the instant motion be denied.

DATED: Honolulu, Hawaii, August 1, 2008.

CLAYTON C. IKEI
Attorney for Plaintiff
SHANNON C. HORITA

No. 08-17166
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Shannon C. Horita,
Plaintiff-Appellant,
v.
Kauai Island Utility Cooperative,
Defendant-Appellee.

D.C. No. 07-00357 JMS BMK
District of Hawaii, Honolulu

Appeal from Judgment in a Civil Case in the United States District Court for the District of Hawaii

PLAINTIFF-APPELLANT'S OPENING BRIEF

STATEMENT OF RELATED CASES

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

CERTIFICATE OF SERVICE

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* * * * *

V.

SUMMARY OF THE ARGUMENT

Horita contends that the District Court erred in granting summary judgment in KIUC's favor with regards to Horita's Title VII Claims that she did not timely exhaust her administrative remedies. Horita contends that the 300-day limitation period to file her EEOC Charge began on December 20, 2005, the date of KIUC's letter which notified Horita of her termination which makes her EEOC Charge filed on September 21, 2006, timely.

Additionally, under Hawaii Law, Horita may file a civil action two years after the cause of action accrued based upon infliction of emotional distress from unlawful employment discrimination by the issuance of the November 18, 2005 Employee Counseling Report and the December 20, 2005 termination letter to Horita. *See*, HRS Sections 386-5, 657-7.

* * * * *

VII.

ARGUMENT

A. Title VII Statute of Limitation ("SOL"), Generally

42 U.S.C. § 2000e-5, Enforcement provisions, states in part:

* * *

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency.

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

* * *

Hawaii is a designated "deferral state" which means the EEOC defers jurisdiction to the HCRC. Therefore, the 300-day limitation period applies. 29 C.F.R. §§ 1601.13, 1601.70, 1601.80.

B. **The SOL for Horita's Title VII Claims Did Not Start to Run until December 20, 2005, When She Was Terminated with No Right to Secure Another Job with KIUC**

In *National Railroad Passenger Corporation v. Morgan,* 536 U.S. 101, 153 L.Ed. 2d 106, 122 S.Ct. 2061 (2002), on February 27, 1995, plaintiff–employee filed a charge of discrimination and retaliation against his former employer with the EEOC and cross-filed with the California Department of Fair Employment and Housing. Plaintiff alleged that during the time period that he worked for defendant he was "consistently harassed and disciplined more harshly than other employees on account of his race." The EEOC issued to plaintiff a Notice of Right to Sue on July 3, 1996, and plaintiff filed his lawsuit on October 2, 1996. While some of the allegedly discriminatory acts had occurred within 300 days of the time the employee filed the charge with the EEOC, many had occurred prior to that time period. *Id.* at 106-107.

The Supreme Court in *Morgan* held that an employee who initially files a charge of discrimination with a state agency in California must file a charge with the EEOC within 300 days of the alleged unlawful employment practice in order to

preserve the claim for a subsequent civil action under 42 U.S.C. § 2000e-5(e)(1). *Id.* at 109. The Supreme Court explained:

> Discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the . . . 300-day time period after the discrete discriminatory act occurred. The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed. Nor does the statute bar an employee from using the prior acts as background evidence in support of a timely claim.
>
> As we have held, however, this time period for filing a charge is subject to equitable doctrines such as tolling or estoppel.
>
> * * *
>
> Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination . . . constitutes a separate actionable 'unlawful employment practice.' Morgan can only file a charge to cover discrete

> acts that 'occurred' within the appropriate time period.

Id. at 113-114 (citations omitted).

Also, the Court in *Morgan* stated that "[a] discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.' A party, therefore, must file a charge within 300-days of the date of the act or lose the ability to recover for it." *Id.* at 110.

In *Ledbetter v. Goodyear Tire & Rubber Co.*, _____ U.S. _____, 127 S.Ct. 2162, 167 L.Ed. 2d 982 (2007), plaintiff-employee worked for defendant - employer from 1979 until 1998. During much of this time, salaried employees were given or denied raises based on their supervisors' evaluation of their performance. In March 1998, plaintiff submitted a questionnaire to the EEOC alleging certain acts of sex discrimination, and in July 1998 she filed a formal EEOC charge. After taking early retirement in November 1998, plaintiff commenced her civil action in which she asserted, among other claims, a Title VII pay discrimination claim. *Id.* at 2165.

On appeal, defendant contended that plaintiff's pay discrimination claim was time barred with respect to all pay decisions made prior to September 26, 1997, or 180-days before the filing of her EEOC questionnaire; and that no discriminatory act relating to plaintiff's pay occurred after that date. The Eleventh Circuit in *Ledbetter* held that a Title VII pay discrimination claim cannot be based on any pay decision that occurred prior to the last pay

decision that affected the employee's pay during the EEOC charging period. *Id.* at 2166.

The Supreme Court in *Ledbetter* considered whether a plaintiff's claim for employment discrimination under Title VII was time-barred when the discrete acts of pay discrimination occurred outside the limitations but had an effect during the limitations period. The Court in *Ledbetter* stated that before challenging an unlawful employment practice under Title VII, an employee must first file a timely EEOC charge. *Id.* at 2166. Such a charge must be filed within 300 days after the alleged unlawful employment practice occurred or else the employee may not challenge the practice in court. *Id.* at 2166-67. The Court in *Ledbetter* emphasized the need to identify the specific employment practice that is at issue when considering whether an EEOC charge was filed on time, noting that "[t]he EEOC charging period is triggered when a discrete unlawful practice takes place, . .. [but] current effects alone cannot breathe life into prior, uncharged discrimination." *Id.* at 2169. An employment practice is a "discrete act or single occurrence that takes place at a particular point in time." *Id.* (internal quotation marks omitted).

The Supreme Court in *Ledbetter* explained:

> We have previously held that the time for filing a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC) begins when the

> discriminatory act occurs. We have explained that this rule applies to any `[d]iscrete ac[t]' of discrimination, including discrimination in 'termination, failure to promote, denial of transfer, [and] refusal to hire.' *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 114, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002). Because a pay-setting decision is a `discrete act,' it follows that the period for filing an EEOC charge begins when the act occurs. Petitioner, having abandoned her claim under the Equal Pay Act, asks us to deviate from our prior decisions in order to permit her to assert her claim under Title VII. Petitioner also contends that discrimination in pay is different from other types of employment discrimination and thus should be governed by a different rule. But because a pay-setting decision is a discrete act that occurs at a particular point in time, these arguments must be rejected. We therefore affirm the judgment of the Court of Appeals.

Id. at 2165.

Here, the District Court determined that Horita "knew by at least October 5, 2005 that her employment would cease on January 1, 2006 because her position was eliminated and she refused Defendant's offer of another position. Thus, she had actual knowledge of the adverse action by October 5, 2005." (*See*, EOR Vol. 1 at 12). Additionally, the District Court rejected Horita's contension that her EEOC complaint was timely as to the December 20,

2005 notice based upon Achenbach's September 2, 2005, statements that "if Human Resources were to remain in-house we would be able to get our jobs back. Pl.'s Decl. ¶ 17. (*See*, EOR Vol. 1 at 12). Also, the District Court determined that there was no indication that the elimination of Horita's position was related to the Human Resources department being outsourced. (*See*, EOR Vol. 1 at 12-13).

In Horita's Declaration in support of her of opposition memorandum to KIUC's Motion, she stated in part:

> 7. On April 19, 2005, Achenbach informed KIUC employees that he intended to reorganize KIUC. Achenbach said that the National Rural Electric Cooperative Assessment (NRECA) would conduct an organizational assessment. Achenbach also stated that the Human Resources Department costs too much and that it should be outsourced.
>
> * * *
>
> 17. On September 2, 2005, Achenbach met with the Human Resources staff and informed us that the Human Resources Department would be "outsourced" as recommended by the assessment done by NRECA. Achenbach mentioned that a cost savings of $500,000.00, which made it favorable to outsource Human Resources. Achenbach also said that the Human Resources Administrator positions Shimokawa and I held were both downgraded

from a Grade 9 to a Grade 5. At the time, our positions were the only positions in the entire company that were downgraded. Achenbach stated that if Human Resources were to remain in-house, we would be able to get our jobs back.

18. To this day, Human Resources remains in-house with none of the Human Resources responsibilities outsourced.

* * *

30. On November 19, 2005, I saw my physicians for anxiety symptoms which I developed in November 2005, whereby I would experience uncontrollable shaking and difficulty in breathing.

31. I submitted physicians' notes indicating that I was unable to work from November 21, 2005 to January 3, 2006. Attached as Exhibit "M" are three "Medical Excuse Forms" which I received from my treating physicians for my symptoms which I experienced in November 2005 . . .

32. On December 13, 2005, KIUC announced that Jackie Cachero was appointed the Employee Services Coordinator's position on December 12, 2005. Exhibit "N" is copy of the KIUC announcement and indicates that Ms. Cachero would have the same functions which I had been performing as a Human Resources Administrator.

> 33. I received a letter dated December 20, 2005 from Ms. Baldwin advising me that effective January 1, 2006 I would be laid off from Kauai Island Utility Cooperative. On January 1, 2006 my employment with Kauai Island Utility Cooperative was terminated.

(*See*, EOR Vol. 2 at 34, 37, 40-41, 109-112; *See also*, CR at 80, 95).

Also, the December 20, 2005 letter from Baldwin to Horita stated in part:

> As Mr. Achenbach informed you in his letter of September 28, 2005, your position in Human Resources will be eliminated December 31, 2005. Therefore, effective January 1, 2006 you will be laid off.
>
> You were offered the opportunity to apply and interview for various open positions. You have chosen not to apply for any positions.
>
> If you recover within 60 days of your lay-off, you may be recalled based on KIUC's operational needs, your work performance and your qualifications. If you are released from your physician's care and are able to work during this time period, please inform us of your availability.

(*See*, EOR Vol. 2 at 113).

Horita contends the District Court erred in its determination that she had "actual knowledge" that

her position would be terminated on January 1, 2006 at least by October 5, 2005, and there was no indication that the elimination of her job was related to the Human Resources department being outsourced. Unlike the plaintiff in *Ledbetter* who claimed that each paycheck she received under a facially neutral pay scheme was part of one continuing violation of federal law, Horita contends that KIUC's letter of December 20, 2005, terminating her employment effective January 1, 2006, foreclosed any possibility of continuing her employment, notwithstanding Human Resources remaining in-house, constituted a new and discrete act of discrimination against her. *Morgan, supra.*

As noted above, Achenbach told the Human Resources staff on September 2, 2005 that the Human Resources Department would be outsourced to save costs per the NRECA recommendation, and that Shimokawa and Horita would be downgraded to Grade 5. However, Achenbach also stated that "if Human Resources were to remain in-house, [Horita and Shimokawa] would be able to get our jobs back." (*See*, EOR Vol. 2 at 37).

Additionally, on December 13, 2005, KIUC announced Jackie Cachero was appointed Employee Services Coordinator on December 12, 2005, which was Proudfoot's job. Proudfoot was Horita's supervisor. Although the title was different, Horita noted that Cachero would be performing the same functions as she did as a Human Resources Administrator. Horita contends that she expected to retain her job in light of Human Resources

remaining in-house with none of its responsibilities outsourced, and the appointment of Cachero. (*See*, EOR Vol. 2 at 37, 40-41, 112).

Furthermore, Schmidt, who was KIUC's Chief Financial Officer, stated that he told Achenbach that he could not outsource all of the Human Resources' functions, duties and responsibilities, and that it was not industry practice to do so. (*See*, EOR Vol. 2 at 64-65). Proudfoot testified that she prepared a report that essentially determined that outsourcing would be impracticable due to the way payroll is handled which is not part of Human Resources, as well as handling benefits which was part of Human Resources. (*See*, EOR Vol. 2 at 143).

The District Court raised that point that Horita did not seek any position within KIUC before her job would be terminated. However, as noted above, on October 4, 2005, Horita received an offer from KIUC for the Administrative Assistant position in Member Services, which paid less than what she was earning. Although Horita declined the job offer, she sent an October 4, 2005 memorandum to Achenbach noting that he mentioned the existence of 17 new positions at the September 2, 2005 Human Resources Department meeting, and that she would be would be willing to consider these positions as they became available. (*See*, CR at 1; EOR Vol. 2 at 38, 105-106, 223).

Moreover, Horita contends that she was unable apply for another position as she was placed on sick leave per doctor's order from November 21, 2005 to

January 3, 2006 and submitted doctors' slips to KIUC. (*See*, EOR Vol. 2 at 40, 109-111).

KIUC recognized that Horita was out sick as its December 20, 2005 letter to Horita noted that if she is released from her physician's care and is able to work within 60-days of her lay-off, to let KIUC know of her availability. (*See*, EOR Vol. 2 at 113).

Horita therefore contends that KIUC's December 20, 2005 letter advising her that her job would be terminated on January 1, 2006 was a new and discrete act that triggered the 300-day period for Horita file her EEOC Charge, as well as the 180-day period to file her HCRC complaint, which makes her EEOC Charge filed on September 21, 2006 timely.

C. **Horita Was Subjected to Emotional Distress as a Result of the Issuance of the November 18, 2005 Employee Counseling Report and December 20, 2005 Termination Letter to Horita, and Therefore under Hawaii Law May File a Civil Action Within Two Years after the Cause of Action Accrued**

Hawaii Revised Statutes ("HRS") Section 386-5, the exclusivity of remedies provision under Hawaii's workers' compensation law, states:

> The rights and remedies herein granted to an employee or the employee's dependents on account of a work injury suffered by the employee shall exclude all other liability of the employer to the employee, the employee's legal representative, spouse, dependents, next

> of kin, or anyone else entitled to recover damages from the employer, at common law or otherwise, on account of the injury, except for sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy related thereto, in which case a civil action may also be brought.

The Hawaii Supreme Court has held that an employee may bring an action against her employer for intentional infliction of emotional distress caused by discrimination in violation of HRS Section 378-2, and that such an action is not barred by the exclusivity provision of HRS Section 386-5. See, *Takaki v. Allied Mach. Corp.,* 87 Haw. 57, 67 (Haw. 1998); *see also, Nelson v. Univ. of Hawaii,* 97 Haw. 376, 395 (Haw. 2001)(Inasmuch as: (1) the plain language of the exception in Section 386-5 applies to claims for "infliction of emotional distress" without limitation; (2) the exception is a remedial provision that must be construed liberally; and (3) the legislative history does not support limiting the exception to intentional infliction of emotional distress claims, the exclusive remedy provision of the workers' compensation law does not bar claims for negligent infliction of emotion distress related to sexual harassment); *Black v. City & County of Honolulu,* 112 F.Supp. 2d 1041, 1048 (D. Haw. 2000)(Where the plaintiff asserts that her employer's negligence resulted in sexual harassment, the negligence claims are so intertwined with sexual harassment that they must be considered a species of the injury for which the legislature carved out an exception in Section 386-5).

HRS Section 657-7, Damage to persons or property, states:

> Actions for the recovery of compensation for damage or injury to persons or property shall be instituted within two years after the cause of action accrued, and not after, except as provided in section 657-13.

HRS Section 657-7 applies to personal injury claims of negligent and intentional infliction of emotional distress and negligence. See, *Linville v. Hawaii,* 874 F.Supp. 1095 (D. Haw. 1994). Likewise, this two-year limit applies to claims of discriminatory employment practices under HRS Sections 378-2 and 378-62 because these statutes do not contain limitation periods. *Id.* at 1103.

Here, Horita contends that she may file a civil action for the infliction of emotional distress from KIUC's alleged discriminatory actions, to wit, the issuance of the November 18, 2005 Employee Counseling Report and the December 20, 2005 termination letter to her. HRS Sections 378-2, 386-5, *Takaki, Nelson, supra.* Additionally, Horita would have two years from the time of these events to file a civil action under HRS Section 657-7. *Linville, supra.*

Thus, Horita contends that as she filed her Court Complaint on July 3, 2007, within the two-year period of HRS Section 657-7, the District Court erred in determining that Horita's State Law Claims were untimely.

D. Alternatively, If the Time Limitation to File the EEOC Charge Began to Run Before December 20, 2005, There Is an Issue of Whether Equitable Tolling or Estoppel Applies Here Which Cannot Be Resolved by Summary Judgment

In *Aronsen v. Crown Zellerbach,* 662 F.2d 584 (9th Cir. 1981), plaintiff alleged that defendant-employer terminated him due to his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 ("ADEA"). The district court granted summary in defendant's favor holding that plaintiff was terminated at a meeting on March 31, 1975 when he was notified of the termination, and except for one brief assignment, did no work for the company. Thus, plaintiff's filing of his notice of intent to sue on January 19, 1977 was untimely under the ADEA. *Id* at 592.

The Ninth Circuit in *Aronsen* stated that a mechanical formulae will not suffice to identify accurately the date of an unlawful practice, in light of the Supreme Court's decision in *Delaware State College v. Ricks,* 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed. 2d 431 (1980)(In a Title VII action, the proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts becomes most painful.) The Ninth Circuit in *Aronsen* determined that in "Title VII, and analogously, ADEA discrimination suits inquiry for the purposes of determining when the limitation period begins to run must center on the date when the employee has notice of the unlawful act; neither succession of work

nor official termination noted on company personnel records is singularly relevant to this inquiry." *Id.* at 593. Moreover, review must proceed on a case-by-case approach. *Id.* at 594.

The Ninth Circuit in *Aronsen* determined that a factual dispute existed as to whether plaintiff knew or should have known on or before March 31, 1975 that he was being terminated or that he was being subjected to an unlawful practice. Therefore, it reversed the district court's determination. *Id.* 594.

The Ninth Circuit in *Aronsen* also noted that on remand, the issue of equitable tolling may arise. Although plaintiff did not raise the issue of equitable tolling as a distinct issue on appeal, it was raised before the district court. Moreover, the issue was interconnected with the same facts and arguments as the accrual date issue, thus defendant suffered no prejudice. *Id.* at 595.

The Ninth Circuit in *Aronsen* also stated that in ADEA cases, "equitable tolling or estoppel almost invariably involves the credibility of witnesses (and) (credibility) is difficult to determine from affidavits or depositions . . . Accordingly, summary judgment seldom will be appropriate when tolling is in issue." *Id.* at 595. The court further noted that in some equitable estoppel cases, the employer's conduct was found to hold out the possibility of reinstatement or otherwise to "lull" the employee into foregoing a timely filing. *Id.* at 595 n.22; *citing, Wilkerson v. Siegfried Insurance Co.,* 621 F.2d 1042, 1045-46 (10th Cir. 1980)(employee allegedly misled as to

reason for discharge); *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 595-596 (5th Cir. 1981) (Adopting equitable tolling in Title VII and ADEA cases. Plaintiff proffered evidence that defendant misrepresented to third party that it would reinstate plaintiff; defendant knew or had reasonably known that the third party would convey the misrepresentation to plaintiff; and plaintiff reasonably relied on the misrepresentation by forbearing to timely file his ADEA claim); *McCoy v. San Francisco, City & County*, 14 F.3d 28, 30 (9th Cir. 1994)(Issuance of written decision by defendant police commission constituted the discriminatory act rather that its oral decision rendered after hearing that triggers the statute of limitation, although plaintiff "knew" about defendant's decision after the hearing.)

In *Naton v. The Bank of California*, 649 F.2d 691 (9th Cir. 1981), the Ninth Circuit determined that plaintiff-appellant did not timely file his notice of intent to sue as to his ADEA claim, but considered whether equitable modification was appropriate. It stated two kinds of equitable modifications have been recognized: (1) equitable tolling which often focuses on the plaintiff's exclusive ignorance of the limitations period and on lack of prejudice to the defendant; and (2) equitable estoppel which usually focuses on the actions of the defendants. *Id.* at 696 (citations omitted). The Ninth Circuit also stated:

> Equitable modification of the limitations period may be appropriate when misleading conduct of the defendant has induced the

> plaintiff to delay filing notice of intent to sue. More specifically, in appropriate circumstances the defendant's records and correspondences may form the basis of equitable estoppel.
>
> A finding of estoppel must rest on consideration of several factors. Of critical importance is a showing of the plaintiff's actual and reasonable reliance on the defendant's conduct or representation. Also important is evidence of improper purpose on the part of the defendant, or the defendant's actual or constructive knowledge of the deceptive nature of its conduct. And, with respect to a claim for either tolling or estoppel, the trier should consider the extent to which the purposes of the limitations period have been satisfied, notwithstanding the delay in filing.
>
> We decline to evaluate these factors for the first time on appeal. Whether to grant equitable relief from the statutory provision is a matter that should be determined 'on a case-by-case basis, depending on the equities in each case.'

Id. at 696 (citations omitted).

In *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975), the issue before the Fifth Circuit was whether the then-90 day statute of limitations of Title VII bars a suit by a plaintiff who did not learn nor in the circumstances could

reasonably have been expected to learn the facts that would support a charge of unlawful employment practice until after the 90-day period clearly passed. *Id.* at 925, citing, 42 U.S.C. § 2000e-5(d) (1970).

The Fifth Circuit in *Reeb* concluded there were circumstances in this case to excuse plaintiff from compliance of the 90-day requirement. The defendants in *Reeb* did not demonstrate, nor alleged any prejudice attributable to them by the failure to comply with the 90-day requirement. Also, the EEOC took the case on the merits, investigated, and issued the right to sue letter. Its action precludes the assumption that the case was stale simply because the 90-day period had elapsed. *Id.* at 930.

Moreover, plaintiff in *Reeb* alleged that defendant actively sought to mislead plaintiff in informing her that her position would be terminated because adequate funds would no longer be available, and facts that would alert a reasonable person to the unlawful discrimination only became known to the plaintiff more than six months after the discriminatory act where a less qualified male replaced her. *Id.* at 930.

In such circumstances, the Fifth Circuit in *Reeb* stated that the statute will not begin to run until the facts should be apparent to the person with a reasonably prudent regard for his rights. A corollary of this principle often found in cases where wrongful concealment of facts is alleged is that a party responsible for such wrongful concealment is estopped from asserting the statute of limitation as a

defense. *Id.* at 930; *see also, Oaxaca v. Roscoe,* 641 F.2d 386, 391 (5th Cir. 1981) (Moreover, plaintiff should be given an opportunity to establish facts that may entitle him to an equitable tolling or delay in the commencement of the running of the 30-day time period to contact an EEO Counselor).

In *Rhodes v. Guiberson Oil Tools Division,* 927 F.2d 876, *revd on other grounds,* 39 F.3d 537 (5th Cir. 1994), the district court dismissed plaintiff's ADEA claim against his employer because he failed to file his charge with the EEOC in a timely fashion. The employer represented to plaintiff that his position was being terminated due to a reduction in work force, and plaintiff accepted that representation in light of a recession in the oil industry. Plaintiff later discovered that defendant hired a younger person to replace him. Assuming the 180-day limit for his EEOC charge began on the date of his discharge, plaintiff's filing was late. *Id.* at 878.

The Fifth Circuit in *Rhodes* noted that under equitable estoppel, an employer is estopped from asserting the filing period if the employer misrepresented or concealed facts necessary to support a discrimination charge. If the defendant did conceal facts or mislead the plaintiff and thereby caused him not to assert his rights within the limitation period, the defendant is estopped from asserting the EEOC filing time as a defense. *Id.* at 879 (citations omitted).

The Fifth Circuit in *Rhodes* determined that the record showed that defendant's misstatement lulled

plaintiff into not approaching the EEOC sooner. Plaintiff only knew that defendant said it was reducing its work force, he would be terminated, and he was 56 years old. He had no reason to suspect that his age was the reason for his discharge. Moreover, the oil industry was in a recession and defendant's proffered explanation seemed credible. Thus, plaintiff was precluded from evaluating his legal options until he discovered that he was misled by the misrepresentations. Thus, the Fifth Circuit determined that equitable estoppel was applicable here. *Id.* at 880-881.

In *Ott v. Midland-Ross Corp.*, 600 F.2d 24 (6th Cir. 1979), plaintiff alleged defendant terminated his employment based upon his age in violation of the ADEA. Plaintiff filed his notice of intent to file a civil action with the Secretary of Labor. Thereafter, the Department of Labor advised plaintiff that it obtained defendant's voluntary compliance of the ADEA and that he would be reinstated. Plaintiff alleged that while he was awaiting reassignment, defendant induced him to forgo his ADEA rights by agreeing to hire him as a consultant. However, defendant later informed plaintiff that it would not honor the agreement. Plaintiff filed his civil action which the district court dismissed for being untimely filed almost seven and one-half months after the three-year period of limitation would normally have expired. *Id.* at 25-26.

The Sixth Circuit in *Ott* reversed the dismissal and determined that the jury should decide when and whether the defendant's acts in securing the

consulting agreement effected a tolling or suspension of the statute of limitations, and when and whether plaintiff discovered, or in the exercise of reasonable diligence, should have discovered that he had been wrongfully induced. Thus, if the jury finds that plaintiff was wrongfully led to forego his right to commence suit, it should compute the period of time within which plaintiff was thus deceived, and that time should not be charged against the three-year period for commencement of his action. *Id.* at 32-33.

In *Dartt v. Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), plaintiff was employed by defendant whose employment was terminated due to a reorganization of the credit card department that left her with no work. Plaintiff contacted an attorney who advised her that an attorney was unnecessary and she should contact the Department of Labor to file a complaint, which she did. The Department attempted to conciliate plaintiff's complaint, but ultimately was unsuccessful. As a result, plaintiff filed her notice of intent to file a civil action, and then her civil action against defendant under the ADEA. However, the district court dismissed it determining that plaintiff untimely filed her notice of intent to file a civil action within the 180-day period under the ADEA, and that she was not entitled to equitable tolling. *Id.* at 1258-1259.

The Tenth Circuit in *Dartt* determined that the deadline to file a notice of civil action is subject to equitable tolling, and such tolling was appropriate here. It noted that plaintiff promptly sought private legal counsel, and filed her complaint with the labor

department. Plaintiff testified that she kept regular contact with the department, and that it was not until after the 180-day period had run that plaintiff was informed that in order to file a private lawsuit against defendant she needed to file a notice of intent to sue within 180 days of the alleged discriminatory act. Plaintiff retained another counsel who promptly filed the notice, although 36 days past the statutory time period. Thus, the Tenth Circuit held that in light of the circumstances in this case, and because of the de facto fulfillment of the main purposes of the ADEA (i.e., to provide the Labor Department with an opportunity to achieve a conciliation of the complaint while the complaint is still fresh, and to give early notice to the employer of a possible lawsuit) the 180-day time limitation was tolled until the filing of plaintiff's notice of intent to sue. *Id.* at 1260-1262.

In *Wilkerson v. Siegfried Insurance Agency,* 621 F.2d 1042 (10th Cir. 1980), plaintiff sued defendant employer for wrongful termination due to age and sex in violation of the ADEA and Title VII, respectively. Plaintiff alleged that her employment was terminated on the pretext that her job was being eliminated, but she later learned that it was not abolished, and in fact had been filled by a younger person of the opposite sex. The district court granted summary judgment for defendant holding that plaintiff failed to timely file a notice of intent to sue with labor department for her ADEA claim, and failed to timely file her charge of discrimination for her Title VII claim. The district court also

determined that plaintiff was not entitled to equitable tolling based upon affidavits. *Id.* at 1044.

The Tenth Circuit in *Wilkerson* stated that in light of its decision in *Dartt, supra,* the issue of whether plaintiff was entitled to equitable tolling of the running of the statutory time period could not be resolved by summary judgment, and that such resolution required an evidentiary hearing. "Whether a case warrants a finding of equitable tolling or estoppel almost invariably involves the credibility of the various witnesses. Credibility is difficult to determine from affidavits, or depositions." *Id.* at 1045. The Tenth Circuit in *Wilkerson* noted it was not suggesting that there should be a finding of equitable tolling or estoppel in this case, but simply holding that the issue should be resolved after an evidentiary hearing. *Id.* at 1045.

In *Cocke v. Merrill Lynch & Co.*, 817 F.2d 1559 (11th Cir. 1987), plaintiff's ADEA action was dismissed in summary judgment for defendant employer because he failed to file a timely charge with the EEOC within the statutory filing period. The district court also determined that equitable tolling was unjustified because when plaintiff received notice of termination, he was cognizant of his ADEA rights, and was suspicious that he was the subject of discriminatory conduct. In the notice of termination, the defendant represented that it would try to find another position in the company for him. *Id.* at 1559.

The Eleventh Circuit in *Cocke* reversed the district court. It described the standard for equitable modifications and that summary judgment is often inappropriate when tolling is at issue in an ADEA case, citing, *Reeb* and *Naton, supra. Id.* at 1561. It further stated:

> Applying these principles, the Court holds that while the employer is actively trying to find a position within the company for the employee, the 180-day filing period of section 626(d)(1) is equitably tolled until such time as it is or should be apparent to an employee with a reasonably prudent regard for his rights that the employer has ceased to actively pursue such a position. This court's application of equitable tolling to the situation here is in harmony with the ADEA's purpose of facilitating informal conciliation.
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> It is too much for the law to expect an employee to sue his employer for age discrimination at the same time he is led to believe the employer is trying to place him in another job. The district court here, in holding the facts do not justify equitable tolling, placed too little weight on this practical situation. Although plaintiff was suspicious that the reason he had not been relocated prior to receiving notice of termination was because of his age, he may well have been justified in waiting before resolving that

> suspicion into a fact he should act upon during the time the employer made a good faith effort to relocate him. At least the situation presents a triable fact which cannot be disposed of on summary judgment.

Id. at 1561-1562.

In *Pearson v. Macon-Bibb County Hospital Authority*, 952 F.2d 1274 (11th Cir. 1992), plaintiff, a black female nurse, sued defendant employer for unlawful termination in violation of Title VII, among other claims. On October 16, 1985, defendant informed plaintiff that it decided to terminate her employment, but gave her the option to resign and seek employment at another hospital, or apply for a transfer to another section within the hospital. If plaintiff refused either option, she would be terminated. Plaintiff advised defendant that she wished to seek a transfer to another hospital section, and sought a position in the hospital Emergency Center, but was told there was no opening available in that area. When offered a position within the Urgent Care Position, plaintiff declined. Thereafter, plaintiff took a medical leave of absence, and was ultimately administratively terminated on January 21, 1986. Plaintiff filed her discrimination charge with the EEOC on April 28, 1986, 194 days after the notice of termination. *Id.* at 1277.

The district court in *Pearson* entered summary judgment against plaintiff as to her Title VII claim. It found that she failed to timely file her claim with EEOC within the 180 days of the alleged unlawful

employment practice per 41 U.S.C. § 2000e-5(c). *Id.* 1279.

The Eleventh Circuit in *Pearson* determined as plaintiff was invited to seek a transfer as an alternative to termination, there are material issues of fact with respect to the issue of equitable tolling of the 180-day filing period. Thus, there needed to be a trial on the issue of availability of equitable tolling on the facts. *Id.* at 1270-1280, *citing, Cocke* and *Reeb, supra.*

In *Stewart v. Booker T. Washington Insurance,* 232 F.3d 844 (11th Cir. 2000), plaintiff claimed that defendant-employer discriminated against her by transferring, terminating, and failing to rehire her on account of her sex and in retaliation for having filed a previous charge with the EEOC. Defendants contended that plaintiff received notice of her termination in May 1997 when she learned that employer's radio stations would be sold at which time all employees would be terminated. Plaintiff testified by affidavit that during the summer and fall of 1997 after defendant announced that its radio stations would be sold, many employees were offered interviews by the new owners. Plaintiff believed that she was not offered an interview because she believed she would continue working for defendant's affiliated companies. By exit interview on November 3, 1997, plaintiff was told she was being terminated and her last day of work was November 21, 1997. *Id.* at 847.

The district court agreed with defendant that plaintiff received notice of her termination in May 1997, therefore she did not file a charge with the EEOC within 180 days of the alleged unlawful practices, as required by 42 U.S.C. § 2000e-5(e)(1). *Id.* at 847.

The Eleventh Circuit in *Stewart* determined that the district court erred in determining that plaintiff's EEOC charge of discriminatory and retaliatory termination was untimely filed and therefore also erred in granting summary judgment to the defendants. The defendants did not present any clear evidence that the decision to terminate plaintiff was made or communicated to her before November 20, 1997. Moreover, the district court improperly discredited plaintiff's testimony that she was never told before November 20, 1997 that she was or would be terminated. Since the charge filing period on a termination claim does not begin to run until an employee is told that she is actually being terminated (not that she might be terminated if future contingencies occur), and plaintiff filed a charge with the EEOC within 180 days of November 20, 1997, the district court erred in granting summary judgment to the defendants. *Id.* at 848.

Also, the Eleventh Circuit in *Stewart* noted that based on the testimony of the president of the defendant companies, rather than establishing that defendants' employees, presumedly including plaintiff, were unconditionally told in May 1997 that they would be terminated, it appeared the employees were told in a general meeting that defendants were

concerned that the employees' jobs *may* be in danger, but that nothing was definite. Although plaintiff may have had a reason, based on the May 1997 meeting, to suspect that she *might* be terminated as a result of the sale of the stations, this was not enough to start the charge filing period running. The 180-day period does not run until plaintiff is told that she is actually being terminated, not that she might be terminated if future contingencies occur. *Id.* at 849 (emphasis added); *see also, Wright v AmSouth Bancorporation,* 320 F.3d 1198 (11th Cir. 2003)(In an ADEA case, when an employee is left simply to infer and deduce that he may be terminated from the surrounding events, no unequivocal communication of an adverse employment decision has occurred; a plaintiff must be told that he is actually being terminated before the 180-day filing period begins to run.); *Loe v. Heckler,* 768 F.2d 409, 421 (D.C. Cir. 1985)("To insist that plaintiff have anticipated her employer's dishonoring its Title VII commitment would require that we attribute either the vision of Cassandra to employees or universal bad faith to employers. Title VII does not mandate preemptive strikes as a precondition to judicial oversight of subsequent misconduct.")

Here, Horita contends that if the Ninth Circuit determines that the 300-day limitation period to file the EEOC charge was before December 20, 2005, then equitable estoppel should apply here. Achenbach represented to the Human Resources staff at the September 2, 2005 meeting that the Human Resources Department would be

"outsourced" as recommended by the assessment done by NRECA. However, if Human Resources were to remain in-house, then Horita and Shimokawa would get their jobs back. Horita relied upon that representation.

However, when Horita received the December 20, 2005 letter advising of her termination on January 1, 2006, Horita realized that Achenbach's September 2, 2005 representation that she and Shimokawa would get their jobs back if Human Resources remains in-house, which it is, was untrue. As a result, Horita filed her EEOC Charge on September 21, 2006 which is within the 300-day limitation period if December 20, 2005 was the trigger date. The EEOC accepted her Charge, and ultimately issued her a right to sue letter on May 25, 2007.

Thus, as discussed above, the courts have held that the time limitation to file an EEOC charge may be subject to equitable tolling or estoppel. *Aronsen, Coke, Reeb, Rhodes, Oaxaca, Ott, Loe, supra.* Additionally, determining whether a plaintiff is entitled to equitable tolling or estoppel cannot be determined by summary judgment. *Dartt, Wilkerson, Cocke, Pearson, Stewart, supra.* Horita contends that the District Court erred in granting summary judgment in favor of KIUC based on the timeliness of her EEOC Charge.

VIII.

CONCLUSION

Therefore, for the foregoing reasons, Horita requests that the Ninth Circuit reverse the District Court's Order granting summary judgment and judgment in KIUC's favor as to Horita's Title VII and State Law claims, and remand this matter for further adjudication.

DATED: Honolulu, Hawaii, January 12, 2009.

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